21-609

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 805.

THE FIRST NATIONAL BANK OF SELMA, PLAINTIFF IN ERROR,

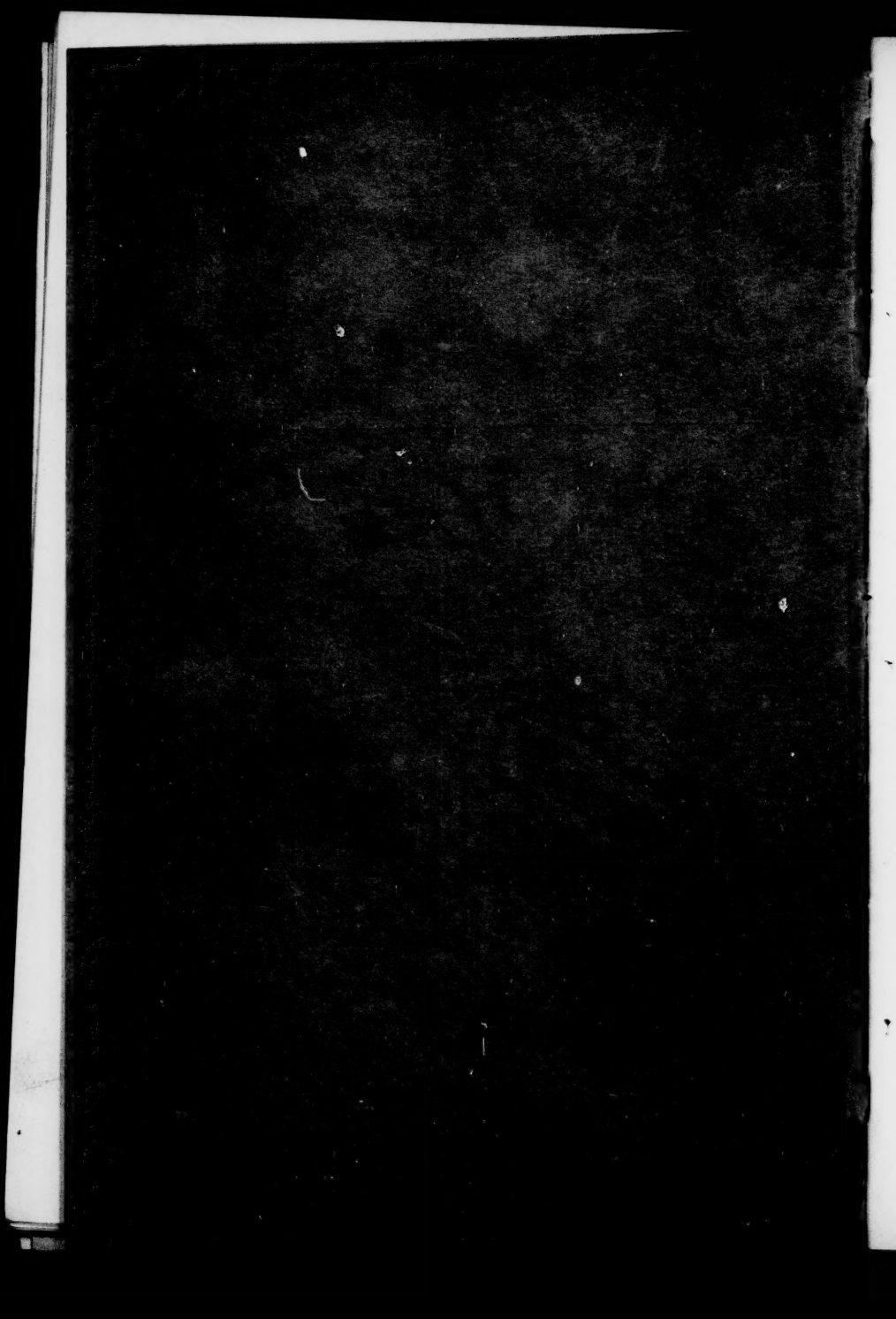
vs.

GEORGE W. COLBY.

IN ERROR TO THE SUPREME COURT OF ALABAMA.

FILED MARCH 12, 1875.

Oct. 2, 1874



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1 Supreme court of Alabama, June term, 1873.

Be it remembered that a regular term of the supreme court of Alabama was begun and held, according to law, at the capitol, in the city of Montgomery, on the first Monday of June, in the year of our Lord one thousand eight hundred and sixty-nine, (A. D. 1869,) it being the seventh day of said month.

Present and presiding as judges of said court:

Hon. E. W. Peck, chief-justice.
" Thos. M. Peters, associate "
" B. F. Saffold, " "

On the 4th of June, 1869, a certain transcript was filed in the office of clerk of the supreme court in words and figures as follow, to wit:

THE STATE OF ALABAMA, *Dallas County:*

2 Be it remembered that the following proceedings were had in the circuit court of Dallas County, Alabama, commencing at the spring term thereof, 1867, in the case of Geo. W. Colby vs. The First National Bank of Selma.

Plaintiff's affidavit.

THE STATE OF ALABAMA, *Dallas County:*

Before me, A. D. Breazeale, clerk of the circuit court for said county, personally appeared Geo. W. Colby, who, being duly sworn, on oath saith that The First National Bank of Selma, a body-corporate under the laws of the United States, is justly indebted to him in the sum of forty-eight hundred dollars, and that the said The First National Bank of Selma has moneys, property, or effects liable to satisfy its debts which it fraudulently withholds; and that an attachment is not sued by him for the purpose of vexing or harrassing the said The First National Bank of Selma.

GEO. W. COLBY.

Sworn to and subscribed before me, 19th day of A. D. Ap'il, 1867.
A. D. BREAZEALE, *Clerk.*

3 *Plaintiff's bond.*

THE STATE OF ALABAMA, *Dallas County:*

Know all men by these presents that we, Geo. W. Colby, Jno. L. Colby, and J. C. Compton, all of the county of Dallas, are held and firmly bound unto The First National Bank of Selma, a body-corporate, and constituted by the laws of the United States, in the sum of ninety-six hundred dollars, to be paid to the said First National Bank of Selma, a body-corporate, constituted under the laws of the United States, certain attorney, executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 17th day of April, A. D. eighteen hundred and sixty-seven.

The condition of this obligation is such that whereas the above bounden Geo. W. Colby hath, the day of the date hereof, prayed an attachment at the suit of Geo. W. Colby against the estate of the above-named First National Bank of Selma, for the sum of forty-eight hundred
4 dollars, and hath obtained the same returnable to the next term

of the circuit court of Dallas County, to be held for said county on the eighth Monday after the 4th Monday in March, 1867:

Now, if the said Geo. W. Colby shall prosecute said attachment with effect, and pay the said defendant all such damages as First National Bank of Selma may sustain by the wrongful or vexatious suing out said attachment, then the above obligation to be void; otherwise to remain in full force and effect.

Signed, sealed, and delivered the date above written.

GEO. W. COLBY. [SEAL.]
JNO. L. COLBY. [SEAL.]
J. C. COMPTON. [SEAL.]

Tested and approved by me 17th April, 1867.

A. D. BREAZEALE.

THE STATE OF ALABAMA, *Dallas County:*

To any sheriff of the State of Alabama, greeting:

Whereas Geo. W. Colby hath complained on oath to me, A. D. Breazeale, clerk of the circuit court of Dallas County, that The First National Bank of Selma, a corporation incorporated and chartered
5 by the laws of the United States, is justly indebted to him to the amount of forty-eight hundred dollars; and oath having been msde that the said The First National Bank of Selma has moneys, property, or effects liable to satisfy their debts, which it fraudulently withholds; and the said Geo. W. Colby having given bond and security according to the directions of the act in such cases made and provided, and made oath that an attachment is not sued out for the purpose of vexing or harrassing the said The First National Bank of Selma:

We, therefore, command you, that you attach so much of the estate of the said The First National Bank of Selma, if to be found in your county, (replev'able on security,) as shall be of value sufficient to satisfy the said debt and costs according to the complaint, and such estate, so attached in your hands, to secure, or so to provide, that the same may be liable to further proceedings thereon to be had at the circuit court to be holden for Dallas County, spring term, 1867, so as to compell the said The First National Bank, of Selma, to appear and answer the above com-
6 plaint of the said Geo. W. Colby, when and where you shall make known to the said court how you have executed this writ.

Witness A. D. Breazeale, clerk of our said circuit court, at office, this 17th day of April, 1867.

A. D. BREAZEALE, *Clerk.*

Sheriff's entry.

Rec'd April 17th, 1867, at 3½ o'clock p. m. Levied this attachment on the southeast corner of out-lot No. 20, on the map of the city of Selma, fronting on Dallas street one hundred and twenty feet and a half, and running back on Franklin street one hundred and ninety feet, more or less, to a lot belonging to Mrs. Joel W. Jones, and designated on the map of Selma as the Andrews lot, and on said lot is situated a dwelling-house and all necessary out-buildings; also, on the northeast corner of out-lot No. 30, in the plan of Selma, fronting and bounded on the north by the Burnsville road, and bounded on the east by Mechanic street; on said lot is situated a steam grist-mill, known as the Alfred Berry Mill.

Also levied on said mill situated on said lot. The size of this lot is not known.

April 17th, 1867.

J. M. DEDMAN,
Sheriff Dallas County.

7 *Complaint.*

In circuit court, Dallas County, State of Alabama, spring term, 1867.

GEO. W. COLBY, PLAINTIFF,
vs.
THE FIRST NATIONAL BANK OF SELMA, DEFENDANT.

The plaintiff claims of the defendant, which is a body-corporate incorporated under the laws of the Congress of the United States of America, in relation to banking associations, approved June 3d, 1864, forty-eight hundred dollars due from them by certificate of deposit signed by Chas. B. Woods, cashier of said incorporation, and dated, respectively, March 28th, 1867, for eighteen hundred dollars, and due ninety days after date, with interest from date; one dated March 23d, 1867, for eleven hundred and eighty-five $\frac{65}{100}$ dollars, and due ninety days after date, with interest from date; and the other, dated March 23d, 1867, for eighteen hundred and fourteen $\frac{35}{100}$ dollars, and due ninety days after date, with interest from date; which said certificates are unpaid, and will not be due until the 23d and 28th June, 1867.

8 The plaintiff claims of the defendant, a body-corporate, incorporated as aforesaid, the further sum of forty-eight hundred dollars due by an account between the plaintiff and defendant on, to wit, the 15th day of April, 1867.

The plaintiff claims of the defendant, a body-corporate, incorporated as aforesaid, the further sum of forty-eight hundred dollars due from them on, to wit, 23d & 28th June, 1867, for so much money before that time had and received by the defendant to and for the use of the plaintiff, which several sums, with the interest thereon, are due and unpaid.

(Signed) WHITE & BOYNTON.
Pl'ff's Attys.

Filed May 22, 1867.
(Sgd.) A. D. BREAZEALE.

Judgment entry.

GEO. W. COLBY
vs.
THE FIRST NATIONAL BANK OF SELMA.

This day came the parties, by their attorneys, and thereupon came a jury of good and lawful men, to wit, J. L. Evans and eleven others, who being empanneled and sworn well and truly to try the issues joined, upon their oaths do say: We, the jury, find for the plaintiff, and assess his damages at five thousand six hundred and thirty-two & $\frac{33}{100}$ dollars.

9 It is, therefore, considered by the court that the plaintiff recover of the defendant the sum of five thousand and six hundred and thirty-two & $\frac{33}{100}$ dollars, his damages as aforesaid, and the costs of this suit, for which execution may issue; and it is further ordered by this court that a venditione exponas issue to the sheriff to sell the property levied upon under the attachment in this case for the satisfaction of this judgment.

BILL OF EXCEPTIONS.

Dallas circuit court, spring term, 1869.

GEO. W. COLBY
vs.
THE FIRST NATIONAL BANK OF SELMA.

Be it remembered that when this cause came on to be heard the following proceedings were had:

J. C. Compton and J. R. John, attorneys, came as the friend' of the court at the instance of Carnelius Cadle, jr., the receiver of the defendant, The First National Bank, appointed by the Comptrol'er of the Currency of the United States, by the advice of the Secretary of the Treasury of the United States, and introduced in evidence the following testimony, to wit:

10 That a draft or transfer order from the Treasurer of the United States for seventy-five thousand dollars was presented to the president of The First National Bank of Selma by the Southern Express Company on the 15th day of April, 1867; payment was refused, and on the morning of the sixteenth day of April the said bank did not open for business. In the afternoon of the 16th April the said bank was taken possession of by the military authorities, in compliance with orders from Gen. Grant, and under instructions from the Secretary of the Treasury of the United States. On the morning of the 17th April, 1867, the president of said bank absconded. On the same day Maj. Gen. Swayne, commanding in the State of Alabama, under the instructions of the Secretary of the Treasury of the United State', with the assistance of Messrs. Keith, Lawler, and Byrd, made an examination into the affairs of said bank, and found a deficiency in the cash account of the same exceeding two hundred thousand dollars. Said bank was a depository of public money and the financial agent of the United States at the date of these occurrences. These facts were public and notorious.

11 Then introduced the charter of the bank, a copy of which is as follows, to wit:

Charter of the bank.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROL'ER OF THE TREASURY,
Washington, August 24, 1865.

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that The First National Bank of Selma, in the city of Selma, in the county of Dallas and State of Alabama, has been duly organized under and according to the requirements of the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, and has complied with all the provisions of said act required to be complied with before commencing the business of banking under said act:

Now, therefore, I, Freeman Clarke, Comptrol'er of the Currency, do hereby certify that The First National Bank of Selma, in the city of Selma, in the county of Dallas and State of Alabama, is authorized to commence the business of banking under the act aforesaid.

12 In testimony whereof witness my hand and seal of office this twenty-fourth day of August, 1865.

[SEAL.] (Signed) FREEMAN CLARKE,
Comptrol'er.

(No. 1537.)

An' then introduced the appointment of Carnelius Clark, jr., as receiver of said bank, a copy of which is as follows, to wit:

Appointment of receiver.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROL'ER OF THE CURRENCY,
Washington, D. C., April 30th, 1867.

Whereas, on the 23d day of April, 1867, John Hopley, examiner of national banks and special agent of the Comptrol'er of the Currency, did present at the counter of The First National Bank of Selma, a national association formed *formed* pursuant to the laws of the United States, and located at Selma, Alabama, a five-dollar circulating note issued by said association, and did then and there demand payment thereof in lawful money of the United States, and payment of said note was refused. And whereas, C. B. Woods, esq., the cashier of the said association, did then and there offer to waive demand and notice
13 of protest, and, in pursuance of said offer, did make, sign, and deliver to the said Hopley an admission in writing, stating the time of the demand, the amount demanded, and the fact of non-payment.

And whereas I am satisfied from the admission in writing aforesaid, and from the report of the said special agent appointed to ascertain whether said association has failed to redeem its circulating notes, that the said association has failed to redeem in lawful money of the United States its circulating notes when payment thereof was legally demanded during the usual hours of business at the office of said association, and is in default:

Now, therefore, I, Hiland R. Hubburd, Comptrol'er of the Currency, in pursuance of the power and authority vested in me by law, do hereby appoint Carnelius Cadel, jr., of Muscatine, Iowa, a receiver for "The First National Bank of Selma," with all the powers, duties, and responsibilities given to or imposed upon a receiver under the provisions of the act entitled "An act to provide a national currency secured
14 by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864.

In witness whereof I have her'to subscribed my name, and have caused my seal of office to be affixed to these presents at the city of Washington, in the District of Columbia, the day and year first above written.

[SEAL.] (Signed) HILAND R. HUBBURD,
Comptrol'er of the Currency.

Then introduced a transcript ot the record of the proceedings in the district court of the United States for the middle district of Alabama, holden at Montgomery, Alabama, wherein the Comptrol'er of the Currency of the United States was the relator or complainant, and the said The First National Bank of Selma was the defendant, as follows, to wit:

United States district court, middle district of Alabama, May 28th, 1867.

Present: The honorable Richard Busteed, judge.

15 TRANSCRIPT OF PAPERS AND PROCEEDINGS IN U. S. DISTRICT COURT.

THE UNITED STATES
vs.
THE FIRST NATIONAL BANK OF SELMA.

This day comes Francis Bugbee, U. S. attorney, and presents the following information in the above-entitled case:

Information.

UNITED STATES OF AMERICA:

District court of the United States for the middle district of Alabama.
Term 1867.

To the honorable Richard Busteed, judge of the district court of the United States in the middle district of Alabama, presiding:

H. B. Hubburd, who is Comptrol'er of the Currency of United States, under the act of Congress hereinafter mentioned, and as such Comptrol'er, by Francis Bugbee, United States attorney for the said district, gives your honor to understand and be informed that the association formed for carrying on the business of banking, called The First National Bank of Selma, Alabama, a body-corporate, existing under and by virtue of an act of the Congress of the United States, entitled
16 "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved the third day of June, in the year of our Lord one thousand eight hundred and sixty-four, did at a time past, to wit, on the first day of November, in the year of our Lord eighteen hundred and sixty-five, at the city of Selma, in the said middle district of Alabama aforesaid, procure, establish, and occupy a banking-house for carrying on therein the business of banking, then and there situate and being, and did then and there, in said banking-house, engage in and carry on the business of banking, and did then and there receive on deposit various large sums of money from various persons, to wit, the sum of fifty thousand dollars, and did then and there buy from various persons various large amounts of exchange, to wit, fifty thousand dollars, and did then and there sell to various persons various large amounts of exchange, to wit, fifty thousand dollars, and did then and there loan on personal security to various persons various large sums of money, to wit, fifty thou-
17 sand dollars, and did then and there do various acts of banking, to the said comptrol'er at this time unknown.

An' the said H. R. Hubburd, Comptrol'er as aforesaid, further gives your honor to understand and be informed, that on the said first day of November, in the year of our Lord eighteen hundred and sixty-five, and thence hitherto up to and including the fifteenth day of April, in the year of our Lord eighteen hundred and sixty-seven, at the said city of Selma, in the district aforesaid, John M. Parkman being then and there director and president of the said association, and Chas. B. Wood being then and there director and cashier of the said association—

I. The directors of the said association did and have knowingly violated, and knowingly permitted the said Jno. M. Parkman, director

and president of the said association, and Chas. B. Wood, director & cashier of the said association, and officers of said association, to violate the provisions of the said entitled act of Congress, in this, that the said directors of the said association did on the first day of Novem-
18 ber, in the year of our Lord eighteen hundred and sixty-five, and afterwards at the said city of Selma, in the district aforesaid, knowingly authorize, allow, suffer, and permit the said John M. Parkman, president of said association, and Chas. B. Woods, cashier of the said association, and as such president and cashier of said association, and as such officers of president and cashier of said association in the said banking-house of said association, then and there to carry on the business of banking, and then and there, and for the said association, to receive and deposit large sums of money, to buy and sell large amounts of exchange, to loan money on personal security, and to do various other acts of banking before fifty per centum of the capital stock of the said association had been paid into said association, or any part paid in, in any way. Fifty per centum of the capital stock has not yet been paid in.

II. And the said directors did knowingly permit, to wit, on the seventeenth day of November, in the year eighteen hundred and sixty-five, the said John M. Parkman, president, as aforesaid, to become
19 liable to said association in a large sum of money, to wit, sixty-five thousand dollars, for borrowed money, and at that time the whole amount of capital stock of said association did not exceed, to wit, one hundred thousand; and thus the said directors did knowing and permit the said John M. Parkman to become liable to said association for borrowed money in a sum greatly exceeding one-tenth part of the amount of the capital stock of said association actually paid in, and said liability was not for or on account of discount or bona fide bills of exchange drawn against existing values, or the discount of commercial or business paper actually owned by said John M. Parkman, contrary to the statutes.

III. The said directors did, knowingly, authorize and suffer and permit the said John M. Parkman, president of said association, and as such president, to use and employ the money, funds, and credit of the said association to a large amount, to wit, to the amount of one hundred thousand dollars, in trade and commerce and in the purchase and
20 sale on speculation of goods, wares, and merchandize, to wit, cotton and iron, and in transporting and causing the same to be transported to various places for sale, contrary to the statute.

IV. And the said directors during the time said association continued banking operations and carrying on the business of banking, to wit, on the fifteenth day of April, in the year 1867, at said city of Selma, in said district, did, knowingly, withdraw and knowingly suffer and permit John M. Parkman, president of said association, to withdraw, and said association to withdraw, a large portion of its capital, to wit, sixty-five thousand dollars, contrary to the form of the statue in such cases made and provided.

Whereby the said H. R. Hubburd, Comptrol'er as aforesaid, says that said association has violated, and the directors have knowingly violated and knowingly permitted the president and cashier, officers of said association, to violate the provisions of the before mentioned entitled act as above stated, whereby all the rights, privileges, and franchises derived from said act are thereby forfeited; and the said H. R. Hubburd, Comptrol'er as aforesaid, prays the said
21 forfeiture declared, and the said association be deemed dis-

solved, and that your honor make all such orders, decrees, and give such judgment as may be necessary in the premises.

(Signed) FRANCIS BUGBEE,
U. S. Attorney for the Middle District of Alabama.

In open court came Francis Bugbee and made oath that the facts stated in the above information as stated he believes to be true in substance and facts.

F. BUGBEE.

Sworn to before me.

E. C. V. BLAKE, *Clerk.*

Filed May 28th, 1867.

(Signed) E. C. V. BLAKE, *Clerk.*

Minutes.

Francis Bugbee, esq., attorney of the United States, moves, under the statutes of 3d June, 1864, section 53, for a rule nisi against The First National Bank of Selma, in Alabama, dissolving the association. Order granted, and ordered that the same be made returnable on Thursday morning, the 13th day of May next.

Subpœna.

22 District court of the United States for the middle district of Alabama.

The President of the United States to the marshall of said district, greeting:

You are hereby commanded to summon John Robbins, C. B. Woods, John C. Graham, and Thos. Peters, directors of The First National Bank of Selma, if to be found in your district, at the instance of the Comptrol'er of the Currency, to be & appear before the district court aforesaid to be holden for said district at the place of holding said court in Montgomery on the thirteenth day of this instant in the year 1867, then and there to testify and the truth to speak in a certain cause pending, wherein the Comptroller of the Currency *of the Currency* is plaintiff, and The First National Bank of Selma, Alabama, is defendant.

Herein fail not, and have you then and there this subpœna.

Witness the honorable Richard Busteed, judge of said court, the fourth Monday of May, A. D. 1867.

Issued the 28th day of May, 1867.

Attest:

[SEAL.] E. C. V. BLAK',
Clerk D. C. Middle District of Alabama.

23 (Endorsed:) Record.

SELMA, ALABAMA, *May 29th*, 1867.

Executed the within subpœna by service on C. B. Woods, John Graham, Thos. Peters, John Robbins, directors of The First National Bank of Selma, this the 3d day of May, 1867.

(Signed) R. W. HEALY, *Marshall.*
By GEO. F. MARLOWE,
Deputy U. S. Marshall.

Minutes.

SATURDAY, *June 1st*, 1867.

Present, the hon. Richard Busteed, judge.

COMPTROLLER OF THE CURRENCY OF THE United States
vs.
THE FIRST NATIONAL BANK OF SELMA.

In this case the defendant does not appear or make answer.

It is therefore considered by the court that said information be taken pro confesso, and that all the rights, privileges, and franchises of said association derived from the act of Congress in said information
24 mentioned are forfeited, and that the said association is adjudged by the court dissolved.

Certificate.

I, E. C. V. Blake, clerk of the United States district court for the middle district of Alabama, hereby certify that the foregoing, written upon twelve pages of legal-cap paper, contain a full, true, and complete exhibit of the libel of information and one subpœna and orders of the court thereon, in the case of The Comptroller of the Currency of the United States *vs.* The First National Bank of Selma, in said court.

Witness my hand and the seal of said court, affixed at Montgomery, this third day of March, A. D. 1867.

[SEAL.] (Sigd.) E. C. V. BLAKE,
Clerk U. S. District Court, Middle Dist. of Alabama.

Upon this state of facts and proof and evidence, Cornelius Cadle, jr., receiver, by said attorneys, moved the court that this suit abate;
25 they also moved the court to *to* dissolve the attachment; they also moved the court to quash and discharge the levy; which said several motions were severally overruled by the court, and the excepted to each and every ruling of the court as they were severally made.

Then plaintiffs in attachment introduced in evidence to the jury three certificates of deposit of the First National Bank of Selma, which were the foundation of this action, and which were in substance as follows:

Certificate of deposit.

$1800. SELMA, ALA., *March 28th*, 1867.

The First National Bank of Selma. Geo. W. Colby has deposited in this bank eighteen hundred dollars, payable to the order of himself, in currency, with interest at 8 % per annum, for ninety (90) days, on return of this certificate properly indorsed.

No. 347. (Sgd.) JOHN M. PARKMAN,
Pres't.

[5 c. rev. stamp.]

Two others of like tenor, dated 23d March, 1867, and both signed by C. B. Woods, cashier, one for eleven hundred and eighty-five $\frac{65}{100}$ dollars, and the other for eighteen hundred and fourteen $\frac{35}{100}$ dollars.
26 The plaintiff also had the summons and complaint and the en-

tries of the sheriff and the levy and return thereon, and showed that the levy was made, as therein stated, on the 17th of April, 1867, said summons and complaint and entries being as above set forth, and here rested his case; and this was all the evidence introduced by the plaintiff. Then the evidence hereinbefore set forth and offered to the court, as above set forth in this bill of exceptions, was all offered and read to the jury for defendant, and this was all the evidence offered in the cause; and upon this evidence the court charged the jury that if they believed the evidence they must find for the plaintiff the amount of the certificate and interest, and to this charge of the court the defendant excepted, and then asked the court to give the following charges, which were reduced to writing, to the jury.

The defendant requested the court to charge the jury—

I. "That if they believe from the evidence that the United States, by instructions from the Secretary of the Treasury and orders from
27 General Grant, had by the military authorities of the United States taken possession of The First National Bank of Selma, and had the same in possession at the time of issuing and levying the attachment in this case, that then they must find for the defendant.

II. That if the jury believe from the evidence that on the 30th day of April, 1867, the United States, by the Comptroller of the Currency, appointed C. Cadle, jr., receiver of The First National Bank of Selma, that then the legal title of the property levied on passed to him, for the use of the United States, under and by virtue of the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, then they should find for the defendant.

III. The defendant further requested the court to charge the jury that if they believe all the evidence offered in this cause that this suit could not be maintained by the plaintiff, and that they must find for the defendant.

28 These charges, numbered one, two, and three, were severally asked and were by the court severally refused, and to such refusal the defendant severally excepted, and prays the court to sign and seal this bill of exceptions; which is done, in term time, on this the 26th day of March, 1869.

(Signed) B. L. WHEELAN,
Judge First Circuit of Alabama.

Appeal-bond.

GEO. W. COLBY
vs.
THE FIRST NATIONAL BANK OF SELMA.

In this case we acknowledge ourselves security for the cost of this appeal to the June term of the supreme court of Alabama, to be held at Montgomery on the first Monday in June, 1869. This the thirty-first day of March, 1869.

C. CADLE, JR.,
Receiver First Nat'l B'k of Selma. [SEAL.]
C. CADLE, JR. [SEAL.]
J. C. COMPTON. [SEAL.]

Approved this 31st day March, 1869.

J. SILSBY, *Clerk.*

Filed March 31, 1869.

J. SILSBY, *Clerk.*

Notice of appeal.

GEO. W. COLBY
vs.
THE FIRST NATIONAL BANK OF SELMA.

29 To Geo. W. Colby, or White and Boynton, his attornies of record:

You will please take notice that the defendant has applied for and obtained an appeal to the supreme court of the State of Alabama, to be held at Montgomery on the first Monday in June, 1869, from the judgment of our circuit court rendered at the spring term, 1869, and has filed an appeal-bond with the names of C. Cadle, jr., receiver of The First National Bank of Selma, C. Cadle, jr., and J. C. Compton, esq., as securities. Selma, 31st day of March, 1869.

J. SILSBY, *Clerk.*

Received in office March 31st, 1869.

GEO. P. REX, *Shff. D. Co.*

Executed by leaving a copy of the within notice with Geo. W. Colby, March 31st, 1869.

GEO. P. REX,
Sheriff Dallas County.

Certificate.

THE STATE OF ALABAMA,
Dallas County:

I, John Silsby, clerk of the circuit court of Dallas County, Alabama, do hereby certify that the foregoing pages, numbered from one
30 to sixteen, inclusive, contain a full, true, perfect, and complete transcript of the record of the proceedings had in a certain cause lately pending in the said circuit court wherein Geo. W. Colby was plaintiff and The First National Bank of Selma was defendant, as appears of record in said circuit court.

I further certify that on the 31st day of March, 1869, The First National Bank of Selma, by Cornelius Cadle, jr., receiver thereof, prayed for and obtained an appeal from the judgment rendered in said cause to the next term of the supreme court of the State of Alabama, and gave as its securities for costs of said appeal on said day C. Cadle, jr., and J. C. Compton, who duly entered into bond as such securities.

I further certify that a citation to hear errors in said cause was duly issued on the 31st day of March, 1869, directed to the said Geo. W. Colby or his attorneys, White & Boynton, citing them to appear at the next term of the supreme court of the State of Alabama and show cause, if any they can, why said judgment should not be reversed, annulled, and held for nought, a copy of which citation was served
31 on the said Geo. W. Colby on the 31st day of March by the sheriff of Dallas County, all of which will appear by a copy of said bond and citation hereto attached and made a part of this transcript.

Given under my hand and official seal at Selma, in the county of Dallas, State of Alabama, this the 26th day of April, 1869.

[SEAL.]

J. SILSBY,
Clerk Circuit Court Dallas Co.

Assignment of errors.

Supreme court, June term, 1869.

THE FIRST NATIONAL BANK OF SELMA
vs.
GEO. W. COLBY.
} Assignment of errors.

And now, at this term of the supreme court, comes the appellant, The First National Bank of Selma, by Chilton and Thorington and Compton, attys., and say that in the record of the proceedings and giving of judgment by the circuit court of Dallas County manifest error
32 hath intervened in this, to wit:

I. Said court erred in entertaining jurisdiction of said cause, said bank having been dissolved and its assets required for the payment of its bills and the prior lien of the United States, and if any surplus remained then that surplus is to be divided pro rata among its general creditors.

2. Said court erred in failing to quash the proceedings and dissolve the attachment, as shown by the bill of exceptions.

3. The court erred in failing to abate said suit, and in failing to discharge the levy of the attachment, as shown by the bill of exceptions.

4. The court erred in the charge given to the jury, "that if they believe the evidence they must find for the plaintiff the amount of the certificate and interest," as shown by the bill of exceptions.

5. Said court in refusing to give the several charges asked by the defendant below, severally, as shown by the bill of exceptions.

6. The court erred in the matter of the bill of exceptions.

33 7. The court erred in giving judgment against the appellant in the court below.

8. And awarding execution thereon and ordering a venditioni exponas to issue as shown in the judgment entry. And for these and other errors apparent in the record the appellant prays said judgment of said circuit court may be reversed, annulled, and for nothing held.

CHELTON & THORINGTON and J. C. COMPTON,
Att'ys for Appellant.

Continuance.

This cause was continued generally at the June term, 1869.

Submission.

January 19, 1870, said cause was argued and submitted.

At the June term, 1871, (on the 9th day of June, 1871,) the following judgment was rendered in said cause:

Judgment entry.

FIRST NATIONAL BANK OF SELMA
vs.
GEO. W. COLBY.
} Pa. 36, 2 dis., No. 2.

Come the parties, by their attorneys, and the record and the
34 matters therein assigned as error being argued and submitted on the briefs of the counsel for the parties, and duly examined and

understood, it seems to the court that in the record and proceedings of said circuit court there is no error.

It is therefore considered by the court that the judgment of said circuit court be in all things affirmed. It is further considered that said appellee recover of said appellant and C. Cadle, jr., and J. C. Compton, sureties on appeal-bond, the costs accruing on said appeal in this court and in said circuit court.

Opinion of the court.

FIRST NATIONAL BANK OF SELMA
vs.
GEO. W. COLBY.
} Opinion.

Appeal from Dallas circuit court.

PETERS, J.:

On the 17th day of April, in the year 1867, the appellee, Colby, commenced an action at law by attachment against the First National Bank of Selma, for the sum of forty-eight hundred dollars. This attachment was regularly issued from the circuit court of Dallas County, in this
35 State, and regularly executed by a levy on lands belonging to said bank, on the day of its issuance. The bill of exceptions taken at the trial shows that said bank ceased to do business on the 16th day of April, 1867, & had, on the 16th day of the same month, refused and failed to pay a draft of the United States for seventy-five thousand dollars. It further appears, that the president of said bank had absconded on the 17th day of April, 1867, and on that day said corporation's house of business and its assets were taken possession of by Gen. Swayne, then commanding the Federal forces in this State, under instructions from the Secretary of the Treasury of the United States, and upon examination the cash account of said bank was found deficient in the sum of about two hundred thousand dollars. It was also shown that said bank was chartered on the 24th day of August, 1865, under authority of an act of the Congress of the United States, entitled "An act to provide a national currency, secured by a pledge of the United States bonds, and to provide for
36 the circulation and redemption thereof." This act was approved June 3d, 1864. After the levy of said attachment, viz, on the 1st day of June, in the year 1867, by decree of the district court of the United States for the middle district of Alabama, "all the rights, privileges, and franchises of said association derived from the act of Congress" were "forfeited," and said association, called the First National Bank at Selma, was adjudged to be "dissolved." The record of the proceedings in said district court declaring the forfeiture and dissolution of said charter thereof were given in evidence to the jury on said trial. It was likewise shown that Cornelius Cadle, jr., had been regularly appointed receiver for said association, as required by law, on the 3d day of June, 1867. The plaintiff also proved by his certificate of deposit the amount of his deposit in said bank to be the sum for which the attachment had been sued out; that is, forty-eight hundred dollars. This was the substance of all the evidence offered on the trial. On this evidence, said Cadle, as receiver, moved the court to dissolve said attachment, and also to quash and discharge the levy of the
37 same on the property of said bank. These motions the court refused; and said Cadle, as such receiver as aforesaid, excepted to the ruling of the court thereon. And thereupon the court charged the jury that, if they believed the evidence, they must find for the plaintiff "the amount of the certificate and interest." This charge was excepted

to by said receiver. Cadle, as receiver as aforesaid, then asked the court to charge the converse of this proposition, that is, "if the jury believed all the evidence offered in this cause they must find for the defendant." This charge the court refused, and the receiver, Cadle, excepted as before. There was a verdict and judgment for the plaintiff for $5,632.33 and costs, and a venditioni exponas was ordered to issue to the sheriff to sell the property levied on.

I have looked into the act of Congress under which the "First National Bank at Selma" was incorporated, and I have not been able to find any express authority there given which would justify a court of law, in which there was a litigation regularly instituted and pend-
38 ing, to dissolve or dismiss an attachment regularly and properly issued and levied on the property of that association, or to discharge the levy so made. Under the laws of this State such motions do not affect the merits of the suit. They are, then, not matters of right, but only of discretion in the court. Such discretion is not a matter of error on appeal to this court. (Gill *vs.* Downs, 26 Ala. Rep., 670; ex parte Putnam, 20 Ala., 592.) Under the provisions of the act of Congress the bank has power to "make contracts, sue and be sued, complain and defend in any court of law and equity as fully as natural persons." (U. S. Stat. at Large, 1863–'64, p. 99, 101, s. 8.) Then its occupies, so far as these rights are concerned, simply the condition of a citizen, and it is entitled to the same indulgences and rights that a citizen may claim, and no more. If the suit is instituted in a State court, as it clearly may be, (8 Wall., 498,) then the law applicable to the conduct of such suits is applicable to the bank, subject, however, to such modifications as the law of Congress may impose.

But the "national currency act," under which the bank at Selma was brought into existence, does not interfere, so far as
39 I am able to see, in any way with the suit in the State court. Of course, an act of Congress made in pursuance of the Constitution of the United States is a part of the supreme law of the land, and a State law must yield to it. (Com. U. S., Art. vi, s. 2; Ableman vs. Booth, 21 How., 517, 520.) But as the bank may sue and be sued as a natural person in this State, it may be sued by attachment; because it stands in no better condition than a natural person, and a natural person, in this State, may be sued by attachment. (Rev. Code, ss. 2928–30, 2942.) The insolvency of the bank does not dissolve the liability to be sued by attachment. The act does not say so. And it is not to be presumed that Congress would interfere with a right so important to the citizen of the State without an express declaration to that effect. It is not a right to be postponed or defeated by a questionable deduction. If it may be interfered with to any extent, in the end it might be paralized and destroyed. (Field vs. Close, 15 Mich.) Then the conduct of the suit against the bank is to be judged and determined by our own law in reference to attachments. This does not interfere with or settle
40 the effect or right of the *lein* under the levy of the attachment. That is not a question that can be raised in this suit in its present shape. No doubt that question is under the control of a jurisdiction where it will be properly determined. Under the law of this State, when an attachment is once properly issued against a corporation, it will not be abated or dismissed because the corporation had, before the issuance of the process, committed an act of insolvency, or because its assets had been placed in the custody of a receiver. The statute of this State governing such suits is as follows: "If the defendant appear and plead, the cause proceeds as in suits commenced in the ordinary mode. If he make no defense, the plaintiff may at the trial-term take

judgment final by nil dicit, or default, or execute a writ of inquiry of damages, as may be necessary. (Rev. Code, ss. 3000, 2942.) The act of insolvency does not dissolve the liability to be sued, nor the liability to be sued by attachment. The act of Congress does not so declare, nor is it necessary for the purposes of that statute so to infer it. By the practice of our courts, attachments are only abatable when
41 they have been issued without affidavit or without bond, as required by law. (Rev. Code, s. 2989; 19 Ala., 32.) These being the only causes enumerated, others are excluded by their omission. And the plea in abatement, as all others, must be made by "the defendant," and not by a stranger. This is the language of the statute above quoted. (Rev. Code, s. 3000; Kirkman & Rosser vs. Patton, 19 Ala., 32.) And matter of abatement cannot be given in evidence on an issue upon the merits, a default, or a failure to plead.

No doubt the Government could send one of its military officers to seize upon its own funds deposited in a bank or elsewhere when they can be legally reached. But the officer thus sent could not go farther and seize the property of the bank also. His possession, as such officer, in the latter case is not the custody of the law which courts of merely legal jurisdiction will respect, but the custody of the sword, which courts are not constituted to resist. This latter custody does not forbid the levy of a proper attachment legally issued. The funds of
42 the United States deposited in the bank were not entitled to any *lein* on the assets of the bank until, at least, the assets had passed into the custody of a receiver, if even then. The Government had power to secure itself against such loss of its deposits by the security required to be taken in another way. The *lein* on the assets seems to be intended for the security of the note-holders of the bank, and not for the deposit. (Acts of Congress, supra, s. 45.) It is possible that the *lein* of the attachment must give way to the equities arising under certain sections of the above-recited act of Congress, and to the necessities of an administration and distribution of the assets of the association by the receiver; but this question does not arise in this case, and it is not necessary to be decided. (Act Cong., supra, s. 47, 50, 52.) Claims against the bank may be such as the receiver may be unwilling to allow. In such case they may be proven to the satisfaction of the receiver or adjudicated in a court of competent jurisdiction. This could not be unless the suit could be instituted against the corporation. And
43 for this purpose a State court is competent to adjudicate such claims. (Act Cong., supra, ss. 47, 50, 52, 57; Kennedy vs. Gibson et al., 8 Wall., 498.) For this reason the doctrine of the case of Paschall vs. Whitsett does not apply (11 Ala., 472.) In this latter case the corporation was extinct before the suit was brought. (See Rev. Code, s. 1775.)

The record does not show that the defendant, said bank, pleaded any plea in defense of said action; and it appears that the claim of the plaintiff was fully proven. The plaintiff was therefore entitled to his judgment. (Rev. Code, s. 3000.) There was, then, no error in the action of the court below. The judgment is affirmed.

Application for rehearing.

Rehearing.

On the 22d day of July, 1871, an application for a rehearing in said cause was filed by the appellant, the First National Bank of Selma, the response to which was as follows:

Response to application for rehearing.

By PETERS, J.:

The application for rehearing in this case is overruled, with costs. The plaintiff in the court below who is appellee in this court was en-
44 titled to his judgment in the circuit court. The opinion delivered in this case is not intended to go beyond this and settle the rights of the parties under the levy of the attachment. If the judgment below was correct, then the plaintiff's rights under the judgment to have it enforced necessarily followed, unless they were defeated by some superior right in favor of the defendant or some third person. (Rev. Code, s. 2837, 2838, 2868, 2955, Autrey vs. Walters, June term, 1871.) In this case the defendant had no right against the plaintiff which was not settled by the verdict. And in such a suit no third person will be permitted to intervene to defeat the rights of the plaintiff to his judgment. This question is sufficiently apparent from the authorities cited in the opinion in the principal, without further discussion.

Writ of error.

To the honorable the judges of the supreme court of the State of Alabama:

The petition of Cornelius Cadle, jr., as receiver of the First Na-
45 tional Bank of Selma, respectfully shows unto your honors that in the case of the First National Bank of Selma versus Geo. W. Colby, decided by the supreme court of Alabama on the 9th day of June, A. D. 1871; that said decision of the supreme court of Alabama affirmed the decision of the circuit court of Dallas County, Alabama, and was final in said cause. That there was drawn in question in said cause the construction of the statute of the United States entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864; and the said decision was against the title, right, and privilege set up or claimed under said statute by your petitioner as such receiver of said national bank in said cause. Your petitioner therefore prays your honors to grant unto him a writ of error returnable to the next term of the Supreme Court of the United States.

J. C. COMPTON,
Of counsel for Petitioner.

Presented and allowed.

THONAS M. PETERS,
Chief-Justice Sup. Court Alabama.

JULY 22d, 1873.

46 *Notice of appeal.*

UNITED STATES OF AMERICA:

To Geo. W. Colby or Alexander White, his attorney of record, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Alabama, wherein the First National Bank of Selma is plaintiff in error and you are defendant in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error, as in the said writ of error mentioned,

should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas M. Peters, chief-justice of the supreme court of the State of Alabama, this the 25th day of July, in the year of our Lord one thousand eight hundred and seventy-three.

THOMAS M. PETERS,
Chief-Justice of the Supreme Court of the State of Alabama.

47 Received in office this the 26th day of July, A. D. 1873.

W. A. BRONTLEY,
Sheriff of Dallas County, Ala.

Executed by serving a copy of the within citation on Geo. W. Colby and leaving the same with him, this the 31st day of July, A. D. 1873.

W. A. BRONTLY,
Sheriff of Dallas County, Ala.

THE STATE OF ALABAMA, *Dallas County:*

Before me, on this the 11th day of August, in the year of our Lord one thousand eight hundred and seventy-three, personally appeared Warren A. Brantly, the sheriff of Dallas County, Alabama, the subscriber, who is personally known to me, and makes oath that he delivered a true copy of the within citation to Geo. W. Colby on the 31st day of July, in the year of our Lord one thousand eight hundred and seventy-three.

WARREN A. BRONTLY,
Sheriff Dallas County, Alabama.

Sworn to and subscribed before me on this 11th day of August,
48 A. D. 1873, at Selma, Alabama, in the middle district of Alabama, by the said Warren A. Brantly.

[SEAL.] HUGH S. D. MALLORY,
United States Commissioner for the Middle District of Alabama.

Bond.

THE UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

Know all men by these presents that we, Cornelius Cadle, jr., as receiver of the First National Bank of Selma, and , , are held and firmly bound unto Geo. W. Colby in the full and just sum of five hundred dollars, to be paid to the said Geo. W. Colby, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents, sealed with our seals and dated this the twenty-fifth day of July, A. D. 1873.

Whereas, lately, at a term of the supreme court of the State of Alabama holden in the month of June, A. D. 1871, in a suit depending in said court between the First National Bank of Selma and Geo.
49 W. Colby, a judgment was rendered against the said the First National Bank of Selma; and the said the First National Bank of Selma, by its receiver, the said Cornelius Cadle, jr., having obtained a writ of error and filed a copy thereof in the clerk's office of the said

court to reverse the judgment in the aforesaid suit, and a citation directed to the said Geo. W. Colby, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said the First National Bank of Selma shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then the above obligation to be void; else to remain in full force and effect.

C. CADLE, JR., [SEAL.]
Receiver First Nat. Bk.
C. CADLE, JR. [SEAL.]
W. B. GILL. [SEAL.]

Sealed and delivered in the presence of—
JAMES F. WALLER.

Approved by—

THOMAS M. PETERS,
50 *Chief-Justice of the Supreme Court of Alabama.*

Filed July the 25th, 1873.

D. B. BOOTH,
Clerk Supreme Court of Alabama.

OFFICE CLERK SUPREME COURT,
Montgomery, Alabama.

I, D. B. Booth, clerk of the supreme court in and for said State, hereby certify that the foregoing pages, numbered from one to fifty, both inclusive, contain a correct copy of the transcript of the proceedings had in the circuit court of Dallas County, Alabama, in the cause of Geo. W. Colby vs. The First National Bank of Selma, as well as a copy of all the proceedings had in said cause in said supreme court of Alabama.

Given under my hand and seal of said supreme court of Alabama this the 13th day of Sept., A. D. 1873.

[SEAL.]

D. B. BOOTH,
Clerk Supreme Court of Alabama.

[Two-dollar stamp attached—State tax on seals.]

(Indorsement on cover:) No. 805. The First National Bank of Selma, plaintiff in error, vs. George W. Colby. Alabama sup. court. Filed 12th March, 1875.

Supreme Court United States.

NO. 805.

First National Bank, Selma,

vs.

George W. Colby.

BRIEF OF P. PHILLIPS AND CHARLES CASE,

Of Counsel for Plaintiff in error.

S. & R. O. POLKINHORN, PRS. D ST. NEAR 7TH, N, W.

Supreme Court United States.

FIRST NAT. BANK, SELMA,
v.
GEORGE W. COLBY.
No. 805.

BRIEF OF P. PHILLIPS AND CHARLES CASE,

Of Counsel for Plaintiff in error.

On 17th April, 1867, Colby, a creditor of the Bank, sued out an attachment against it, on the allegation that it had property and effects liable to satisfy its debts, which it fraudulently withholds.

The attachment was levied the same day on the real estate of the Bank, including a dwelling house and grist mill.

The declaration was filed on 22 May, 1867.

On the trial, at the Spring Term, 1869, by bill of exceptions, it is shown that Cornelius Cadle, without objection, appeared by his attornies and proved his appointment as Receiver of said Bank, on 30 April, 1867.

He further proved that a draft of the Treasurer of the United States for $75,000 had been presented to the Bank for payment on the 15 April, 1867, and payment refused.

That on the morning of the 16 April, the bank did not open for business.

That on the afternoon of the 16 April, the Bank was

taken possession of by Gen. Swayne, commanding the State of Alabama, under instructions from the Secretary of the Treasury.

That on the morning of the 17 April, the President of said bank absconded.

That on the same day Gen. Swayne, under instructions from the Secretary, with the assistance of Messrs. Keeth, Lawler and Byrd, made an examination of the officers of the bank, and found a deficiency in the cash accounts of a sum exceeding $200,000.

That the said Bank was a depository of public money, and the financial agent of the United States at the date of these occurrences, and that all these facts were public and notorious.

In the appointment of the Receiver, produced in evidence, it is recited that on 23 April, 1867, John Hopley, the examiner of the National Bank, and special agent of the Comptroller, did present at the counter of the Bank a five dollar circulating note issued by it, and did then and there demand payment in the lawful money of the United States which was refused; and that Woods, the cashier, did then and there waive demand and notice of protest, and executed and delivered to Hopley an admission in writing, stating the time of the demand, the amount demanded, and the fact of non-payment.

Thus satisfied of the failure of the Bank to redeem its circulating notes, the appointment of the Receiver is made.

The Receiver also introduced in evidence the transcript of proceedings in the District Court of the United States, wherein the comptroller was relator or complainant, and the bank defendant.

This proceeding by the comptroller was filed 28 May, 1867. (p. 6.)

It alleges several gross violations of the act of Congress, regulating the Bank by its officers and directors, which require the forfeiture of its charter.

Notice was served on the directors, but they did not appear, and on 1st June, 1867, the following judgment was entered:

"In this case the defendants do not appear or make answer.

It is therefore considered by the Court, that the said information be taken *pro confesso*, and that all the rights, privileges and franchises of said Association, derived from the act of Congress in said information mentioned, are forfeited, and that the said Association is adjudged by the Court dissolved." (p. 9.)

On these proofs, the Receiver moved to abate the suit; to dissolve the attachment; to quash and discharge the levy. These several motions were overruled. (p. 9.)

The Receiver then offered the same evidence without objection to the jury and asked the Court to instruct them.

1. That if they believe from the evidence that Cadle was legally appointed Receiver on the 30th April, 1867, that then the legal title of the property levied on, passed to him for the use of the United States, by virtue of the act of 3d June, 1864, and they should find for defendant.

2. That if they believed from the evidence that the United States had, by its military authorities, under instructions from the Secretary of the Treasury and the President, taken possession of the property of the bank, and had it in its possession at the time of issuing and levying the attachment, they must find for defendant.

3. That if they believed all the evidence offered, the suit could not be maintained by the plaintiff, and they must find for the defendant.

These several instructions were refused, and exception taken, and on the 26th March, 1869, being a day of the term, the bill of exceptions was signed by the Judge.

A verdict and judgment were thereupon rendered in favor of the plaintiff for the sum of $5,632.33, and it was further ordered that a *venditioni exponas* issue to the Sheriff to sell the property levied on under the attachment for the satisfaction of the judgment.

From this judgment an appeal was taken by Cadle to the Supreme Court of Alabama, where an assignment of errors was filed on the following grounds—

1. The Court erred in entertaining jurisdiction of the cause, the Bank having been dissolved and its assets required for the payment of its bills and the protection of the U. S., and if any surplus remained, then that surplus to be divided *pro rata* among its general creditors.

2. The Court erred in not quashing the proceedings and dissolving the attachment.

3. The Court erred in not abating the suit and failing to discharge the levy.

4. The Court erred in awarding execution and, ordering a *venditioni exponas.*

The Supreme Court affirmed the judgment of the Court below, whereupon Cadle, the Receiver, petitioned for a writ of error under the 25 section, which was allowed him by the Chief Justice of said Court.

ASSIGNMENT OF ERRORS.

The Supreme Court erred in affirming the judgment of the Court below. If the suit could be maintained after insolvency and the dissolution of the Association, it could

only be for the purpose of ascertaining the debt due by the plaintiff. In directing execution to be levied on the property attached and the proceeds of sale applied to the satisfaction of the plaintiff's debt, it violated the act of Congress of 3 June, 1864.

THE ACT OF 3 JUNE, 1864.
13 *Stat.*, 99.

The reading of this act will show that, except in a special instance, there is no preference to be given in case of the insolvency of the Association. The general rule being a *pro rata* division between all the creditors of the Bank.

The 47 section secures a preference to the United States, by declaring that the " United States shall have a first and paramount lien upon all the assets of the Association," to make good any deficiency in the proceeds of the bonds pledged to them, in paying the circulating notes of the Association.

In reference to other creditors the act seeks to secure the equitable rule of equality, and for this purpose it provides as follows :

When the Comptroller becomes satisfied that the bank has made default as specified in the act, he is to appoint a receiver, who is to take possession of all its assets and collect all its debts, and under direction of the Court to sell its real estate, and all money received by him are to be paid over to the Treasurer, subject to the order of the Comptroller. The Comptroller is then to advertise for all creditors to present their claims—and, after making provision for refunding to the United States any deficiency in the redemption of the notes of the Association, he is to make a *rateable dividend* " on all the claims proved to his satisfaction, or adjudicated in a court of competent jurisdiction. (Sec. 50.)

Still further to secure this equality among the general creditors, it is provided that all transfers of its property of any kind, and all payments of money made by the Association," after the commission of an act of insolvency, or in contemplation thereof, *with a view to prevent the application of its assets in the manner prescribed by this act, or with the view to the preference of one creditor over another*, except in the payment of its circulating notes, *shall be utterly null and void.*" (*Sec.* 52.)

The act further provides in the 53 section for a forfeiture of the rights ~~denied~~ derived under it, to be adjudged on a proceeding for this purpose instituted in a Federal Court by the comptroller.

That a creditor might bring a suit against the Association in a State Court is impliedly admitted in the 50 section, which provides for a rateable dividend by the comptroller among those who have established their claims to his satisfaction, or have had them "adjudicated in a Court of competent jurisdiction."

The 57 section expressly recognises this right in the provision "that such actions, and proceedings against any Association under this act," may be had either in the Federal Courts or—"in any State, County or Municipal Court, in the county or city in which said Association is located"

The Bill of exception shows that prior to the institution of legal proceedings by Colby—to wit: on the 15 April, a Treasury Draft had been presented to the Bank and payment refused, and that on the 16, Gen. Swayne had taken possession under instructions of the Secretary of the Treasury.

In this condition of things what were Colby's rights as creditor of the Bank?

We submit that they only authorized him to appear before the Comptroller and prove his claim, or to appear before a court of competent jurisdiction in a suit for this purpose. But whether the one or the other mode was adopted, his interest as creditor could not be increased or diminished. He could only be entitled to a "rateable dividend"

But the suit brought by Colby was for something more than to have an authoritative determination of his debt. It sought to have condemned to the payment of his claim the real estate of the Association.

In this he has prevailed, for the judgment of the Court directs this property to be sold exclusively for the satisfaction of his debt.

Colby thus succeeds by a judicial proceeding in cutting off the prior lien of the United States, and in excluding all other creditors, while the act was intended to secure both this prior lien and rateable division among the creditors.

We have already cited the provisions which declares void all transfers of the Association of any of its rights or assets after the commission of an act of insolvency.

This is clearly intended to prevent a preference being given to a creditor, and if a voluntary conveyance could not secure such a preference it would seem to follow that no creditor could gain such a preference by judicial proceedings.

If preference was left to a race of diligence, the foreign creditors, that is, those who live at a distance from the bank's location, would necessarily be always distanced in the contest, and the equality promised to them by the act would become a mere mockery.

We entirely concur in the opinion of Mr. Justice Strong, in the case of the Venango v. National Bank, 56 Penn. 14, in which, after reciting the various provisions in reference to this rateable division among the creditors, in sections 50 and 52, he says: "These sections admit of no doubt that the purpose of Congress was to secure all the assets of the bank existing at the time of the insolvency for rateable distribution. We cannot assent to the argument, that it was intended for no more than to avoid all acts of the bank itself; all voluntary transfers by it of its notes, bonds, deposits, &c., with a view to giving preferences. Its language is general, *as applicable to legal as to voluntary transfers.*"

By the 2d sec. of the act 3 March 1873, the 57 section of the act of 1864, which authorizes suits to be maintained against the bank in a state Court, is thus amended:

Provided, "That no attachment, injunction or execution shall be issued against such association, or its property, before final judgment in any suit, action, or proceeding in any state, county or municipal court. (17 Stats. 603.)

We regard this as but declaratory of what was intended to be enacted by the 50 and 52 sections.

In the opinion of the Supreme Court of the State it is said—

"The insolvency of the bank does not dissolve the liability to be sued by attachment. The act does not say so, and it is not to be presumed that Congress would interfere with a right so important, without *an express declaration to that effect.* It is not a right to be postponed or defeated by a *questionable deduction.*" p. 14.

We submit, from the foregoing citations, we have demonstrated, that equality among the creditors was a marked characteristic of the act; that the sections cited contain "*express declaration*" to that effect; and it is not a "*questionable deduction*" that to permit a creditor to obtain a preference after an act of insolvency, by an attachment, is in violation of the letter and spirit of the act.

THE DISSOLUTION OF THE ASSOCIATION.

We have shown from the bill of exceptions, that on the 1 June, 1867, nearly two years before the trial of this cause, it had been adjudged by a competent tribunal "that all the rights, privileges and franchises of said Association, derived from the act of Congress, are forfeited, and that the said Association is dissolved."

Independent of the act of Congress there was no such thing as the First National Bank of Selma." This corporate name, and all the rights that pertained to it were derived from the act of Congress, and when by proceedings under this act it ceased to exist, there was nothing left of it, either to do or to suffer.

When, therefore, it was shown to the Court that the bank had no longer any existence, jurisdiction over it ceased; nor could it render a judgment against the Receiver, now in Court as the successor or representative of the bank, by which the property of the bank would be appropriated to the payment of the plaintiff's demand.

This is familiar doctrine, and needs no citation of authorities.

In the case of Mumma v. Potomac Company—a judgment had been recovered against the Company—but after a dissolution a *scire facias*, was issued to revive it.

"The attornies, upon the record of the defendant, suggested to the Court that since the rendition of the judgment the corporation had surrendered its charter, and that it been vacated and annulled."

The Circuit Court gave judgment for defendant, and Mumma presented his writ of error to this Court.

It was here held, Story, J., delivering the unanimous opinion of the court, that there was no pretence to say "that a *scire facias* could be maintained, and a judgment had thereon against a dead corporation, any more than against a dead man."

"A corporation by the very terms and nature of its potitical existence is subject to dissolution, by a surrender of its corporate franchise, and by a forfeiture of them for wilful misuser or non-user. Every creditor must be presumed to understand the nature and incident of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter."

8 Pet, 286.

This decision is referred to in the case of Paschal v. Witsit, 11 Ala., 479, in which this same doctrine is fully asserted in reference to the right to proceed by garnishment after a dissolution of the corporation.

The Court say—"A corporation after dissolution, for all legal purposes, is a nonentity, incapable of suing or being sued, and a judgment which assumes that a garnishee is its debtor, is untrue in point of fact as well as law.

Whether the creditors have a remedy in Equity against the real and personal estate of a corporation that is civilly dead, we need not inquire, for however this may be it is certain that there is no right to proceed by garnishment."

In the work on corporations by Angel & Ames—it is said that where during the pendency of a suit, a corporation is dissolved, it becomes defunct, and the suit abates unless the legislature by some act saves the right of action. In other words, the case of a corporation is not to be distinguished from the case of a private person dying *pendente lite*. § 638.

In the opinion of the Supreme Court of the State, now before us, it is held that the case of Witsit, which was urged upon them, was not applicable, because in that case the corporation had been dissolved before the action was commenced.

But the principles determined by that case, as well as those ruled by this Court, in Mumma's case, as well as the authority of all elementary writers, show that the proceedings against a corporation cannot be continued after dissolution, though commenced before.

But we are not governed in this case by the decision of the courts of the State. This is a corporation created by the government of the United States. It lives only by virtue of their law, and dies by the same law.

The Receiver was appointed on 30th April; he takes possession of all assetts of the Bank, with direction to sell its property and collect its debts. He occupies then, by virtue of *statutory provision*, the same position as a Receiver appointed by the Court.

In Mississippi, a similar provision for the forfeiture of Bank Charters exists, and a similar authority vested in a Receiver.

A creditor of the bank brought suit against the Receiver alleging sufficient assets in his hands.

An exception was filed, denying the jurisdiction of any other court than the one which appointed him.

The case came to this Court, and by its unanimous opinion the exception was sustained,—the Court referring

to the case of Wiswall vs. Sampson, decided at the same term, in which it was held, that property in the hands of a Chancery Receiver could not be sold under an execution from another court, though the judgment was recovered and the execution levied, *before the Receiver obtained possession.*

Peale v. Phipps, 14 How., 372.

The case then is this: an attachment suit commenced by a creditor of a National Bank, after acts of insolvency and after the government had taken possession of its property, Cadle, the Receiver, duly appointed under the act, appears to this suit and files his objections to the proceeding. No exception is taken, either as to his appearance or to the mode of pleading these objections. The facts presented constitute a good plea in bar. (37 Ala. 56.) Judgment is rendered against the bank—Cadle appeals to the Supreme Court of the State, ~~then~~ there the judgment is affirmed—Cadle then petitions that he be allowed a writ of error to this Court, and this is granted.

The case then before the Court is, substantially, Cadle, Receiver v. Colby, and we submit, that the defense made by him, was valid in law, and that in overruling it the Supreme Court of the State erred, and its judgment must be reversed.

It is probable that Cadle might have proceeded in the Circuit Court of the United States by bill of injunction to stay these proceeding. But as he has chosen to appear in this suit at-law, where the questions of law have been fairly presented and ruled upon by the Court, no sufficient reason is seen why the case on its present form may not be adjudged by the Court.

P. PHILLIPS,
CHARLES CASE,
for Plaintiff in Error.

In the Supreme Court of the United States.

THE FIRST NATIONAL BANK OF SELMA,
Plaintiff in Error,

vs.

GEORGE W. COLBY.

No. 805.

In Error to the Supreme Court of Alabama

ALEXANDER WHITE, *for Defendant.*

This is a suit by original attachment, instituted in the Circuit Court of Dallas County, State of Alabama, on the 17th of April, 1867, by George W. Colby, defendant in error, against the First National Bank of Selma, a banking institution organized under the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, for the recovery of certain sums of money claimed to be due upon several certificates of deposit, in the aggregate amounting to forty-eight hundred dollars, besides interest.

The attachment was placed in the hands of the Sheriff of Dallas County, and by him was levied upon certain real estate in the city of Selma, as the property of defendant.

At the spring term of the Circuit Court aforesaid the cause came on for trial. The defendant filed no plea, but J.

C. Compton and J. R. John, attorneys, as "the friend of the court," at the instance of Cornelius Cadle, jr., claiming to be the receiver of the defendant, The First National Bank of Selma, appointed by the Comptroller of the Currency of the United States, by the advice of the Treasurer of the United States, introduced certain evidence, which is set out in the record, from page 4 to page 9, both inclusive, and which, so much of it as is deemed important to call attention to, will be hereafter specifically referred to; and thereupon (see page 9 of printed transcript of record) "moved" the court "that this suit abate." "They also moved the court to dissolve the attachment. They also moved the court to quash and discharge the levy."

These several motions were overruled by the Court, and exceptions were taken by the counsel.

The plaintiff then introduced his evidence, certificates of deposit by the president of the bank, together with the process in the cause, and proved the making of the levy on the 17th of April, 1867, and rested.

Then the other evidence set forth in the bill of exceptions, as it appears in the record, was all offered and read to the jury for *the defendant.* This being all the evidence, the Court charged the jury that, if they believed the evidence, they must find for the plaintiff the amount of the certificates of deposit, with interest.

To this charge of the Court the defendant excepted, and asked the Court to give the following charges:

I. "That if they believe from the evidence that the United States, by instructions from the Secretary of the Treasury and orders from General Grant, had by the military authorities of the United States taken possession of The First National Bank of Selma, and had the same in possession at the time of issuing and levying the attachment in this case, that then they must find for the defendant.

II. That if the jury believe from the evidence that on the 30th day of April, 1867, the United States, by the Comptroller of the Currency, appointed C. Cadle, jr., receiver of The First National Bank of Selma, that then the legal title of the property levied on passed to him, for the use of the United States, under and by virtue of the act of Congress entitled 'An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June 3d, 1864, then they should find for the defendant.

III. The defendant further requested the court to charge the jury that if they believe all the evidence offered in this cause that this suit could not be maintained by the plaintiff, and that they must find for the defendant."

These several charges were refused by the court, and defendant excepted.

The jury found a verdict for the plaintiff, and thereupon the Circuit Court rendered judgment. From that judgment an appeal was taken to the Supreme Court of Alabama, June term, 1869. At the January term, 1870, the cause was submitted, and at the June term, 1871, judgment was rendered by the Supreme Court affirming the judgment of the Circuit Court, and from the judgment of the Supreme Court of Alabama the case is brought by writ of error to this court.

The questions which arise upon this record present themselves in the following order:

First. Had the plaintiff in the original suit the right to sue the defendant in the mode pursued by him?

Second. Did the Circuit Court err in overruling the several motions submitted by "the friend of the court," at the instance of one claiming an interest in the controversy? and

Third. Had the defendant the right to set up the several attempted matters of defense asserted by counsel without *plea* or *proposing to plead;* and if it had, were they or any of them defenses to the action of plaintiff, and did the court err in overruling them?

First, then, had the plaintiff the right to sue the defendant in the mode pursued by him?

The plaintiff in error is the creature of the act of Congress of June 3d, 1864. It is the law of its being, and all of its rights and powers, and its liabilities as well, are defined and determined by it.

Section 8 of the said act of Congress, among other things, enacts that "Such associations shall have power to adopt a corporate seal, and shall have succession by the name designated in its organization certificate for the period of twenty years from its organization, unless sooner dissolved according to the provisions of its articles of association, or by act of its shareholders owning two-thirds of its stock, or unless the franchise shall be forfeited by a violation of this act; by such name it may make contracts, sue and be sued, complain and defend in any court of law and equity as fully as natural persons." (United States Statutes at Large, vol. 13, page 101.)

Section 57 of the act of Congress provides that suits, actions, or proceedings against any association under this act may be had in the circuit, district, or any territorial court of the United States, or in any State, county, or municipal court in the county or city in which such association is situated, having jurisdiction in similar cases. (13 Statutes at Large, page 116.)

By these express provisions the defendant was liable to be sued as any natural person in the State in which it had established itself. (Bank of Bethel vs. Pahquiogue Bank, 14 Wall., 383.)

By the laws of Alabama an attachment may be sued out in certain enumerated cases, and upon conditions specified in the statutes authorizing them. (Revised Code of Alabama, sections 2927 and 2978.)

By section 2943 of the Revised Code of Alabama real estate is made subject to levy under attachment.

Under the act of Congress and these statutes of the State of Alabama, it is clear that the plaintiff Colby had the right to sue the defendant in the State Court, and in the manner he did, and that the service of process upon the defendant by the levy upon real estate was legal.

Second. Did the Circuit Court err in overruling the several motions submitted by the "friend of the court" at the instance of Cadle, claiming an interest in the controversy, as receiver.

Amici Curiæ, and privies in interest may move to quash or make any motion for matters *apparent* upon the face of the record. (Planters & Merchants' Bank vs. Andrews, 8 Porter's Repts., 404.) But if the attachment is regular on its face and supported by a proper affidavit, a stranger to the record cannot intervene and submit a motion to quash upon matters *dehors* the record properly triable by a jury, though he may have an interest in the question and motion. (Cockrell vs. McGraw, 33 Ala. Repts., 526.) In Alabama it is settled by the decisions of the Supreme Court that a motion to quash an attachment is addressed to the sound discretion of the court, and is not revisable on error. (Penn vs. Edwards, 42 Ala. Rep., 655; Gill vs. Downs, 26 Ala. Rep., 670, Reynolds vs. Bell, 3 Ala. Rep., 57.)

These authorities directly or by implication apply to and preclude each of the motions submitted by counsel as *Amici Curiæ* to the Circuit Court. The motion "that the suit abate, that the court dissolve the attachment, and that the Court quash and discharge the levy." (See page 9, paragraph 25, of printed transcript.) Upon the face of the record the proceedings were regular, and the propriety of these motions, any one or all of them, depended upon issues of fact, which issues could not be made, by one not a party to the record.

Third. Had the *defendant* the right to set up the several attempted matters of defense asserted by counsel, without plea, or proposing to plead, and if it had, were they or any

of them defenses to the action of plaintiff, and did the Court err in overruling them.

The defendant in the Circuit Court had no right to introduce evidence without an issue upon the pleadings, especially had it no right to introduce evidence of matters which could be legal only under a special plea. The record showed no plea or any offer to plead by the defendant, nor can the Court intend against the judgment of the Court below, that any plea was filed. The affirmative devolves upon the plaintiff in error, and he must show error. The presumption in the appellate Court is in favor of the judgment of the inferior Court. But if this be otherwise, the evidence offered did not establish the facts proposed, nor did the facts, if proven, constitute a bar to the plaintiff's action, or authorize the charges asked of the court by the defendant.

Without discussing the authority of the United States, by the instructions of the Secretary of the Treasury and orders of General Grant to take possession of the First National Bank of Selma, I submit that these could not interfere with the plaintiff's right to a judgment against the bank. The taking possession of the bank by the military authorities was not a taking possession of real estate belonging to the bank, but if this should be so held, and in this view, the Court should determine that the real estate of the bank was so far in the custody of the United States as not to be subject to levy under the attachment, still this would not authorize the charge asked, for the reason that the levy of the attachment was a mere mode of service to bring the party defendant into court, and the appearance of the defendant by counsel in introducing evidence, and asking charges and taking a bill of exceptions, was a submission to the jurisdiction of the court, which would cure any defect in the *service* of the attachment. "An appearance to a suit commenced by attachment has the same effect as a waiver that it would have to a suit commenced in the usual mode." (Burroughs vs. Wright, 3 Ala. Rep., 43.)

The attachment was levied on the 17th of April, 1867. The second charge asked by the defendant assumed that the legal title to the property levied upon passed out of the defendant to the receiver on the 30th of April, 1867. This implied that it was in the defendant before that time, and would have been a sufficient levy of the attachment to bring the defendant into court. The issue which was being tried in the Circuit Court was whether the First National Bank of Selma owed the plaintiff the money he claimed of it; not whether the ownership of the property which had been levied upon under the attachment was in the bank or in the receiver appointed by the Comptroller.

"Nothing short of a release or the acceptance of something in satisfaction will discharge a cause of action for a breach of contract." (Nesbit vs. McGehee, 26th Ala. Rep., 748.)

The act of Congress authorising the organization of National Banks does not provide for any discharge of the corporation upon a seizure of its assets by a receiver appointed by the Comptroller, as in cases under Bankrupt acts, nor does it necessarily involve a dissolution of the corporation.

In no event could the defendant plead its own wrongful act in violating its charter in discharge of its indebtedness to a creditor.

The charges asked by the counsel for the defendant seem to be predicated upon the idea that the appointment of the receiver by the Comptroller or the decree of the District Court, one or both, had the effect of abating the suit, and assuming that the evidence introduced by the defendant established these facts, the defendant rested its defense upon such conclusion of law, neither of these assumptions are well grounded. A corporation is not to be deemed dissolved by any misuser or nonuser of its franchise until the default has been judically ascertained and declared. This is the general rule applicable to corporations, but in cases of national banking institutions, such as this under consideration, the act of Con-

gress under which they are created declares what acts shall work a forfeiture of the franchise, and provides the manner in which such forfeiture shall be determined and declared, by section 53 of the act, which is as follows:

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall however be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved." (13 Statutes at Large, page 116.)

It is evident that these provisions are exclusive, both as to the acts which work a forfeiture and the mode of ascertaining and declaring such forfeiture.

The proposed appointment of a receiver did not then operate a dissolution of the corporation, and I submit that it is equally apparent upon inspection of the transcript of the record of the District Court of the United States for the middle district of Alabama, that its decree could have no such effect.

This transcript shows that on the 28*th of May*, 1867, an information was filed in said District Court in the name of the Comptroller of the Currency, &c., against The First National Bank of Selma, charging violations of its charter and forfeiture of its franchise, and praying that the forfeiture be declared and the corporation dissolved. On the same day Francis Bugbee, attorney of the United States, who had filed the information, moved the court for "a rule *nisi* against 'The First National Bank of Selma,' dissolving the corporation." The order was made, and the rule *nisi* was made returnable on Thursday morning, the 13*th of May next.*

A subpœna was issued to certain persons, directors of The

First National Bank of Selma, on the 28*th of May*, to appear before said District Court "on the 13th day of this instant, then and there to testify, and the truth to speak, in a certain cause pending, wherein the Comptroller of the Currency is plaintiff and The First National Bank of Selma is defendant."

This subpœna was received "*Selma, Alabama, May 29th*, 1867," and returned executed the 3d of May, 1867.

"MINUTES.

"SATURDAY, *June 1st*, 1867.

"Present—the Hon. Richard Busteed, judge.

"Comptroller of the Currency of the United States,

vs.

The First National Bank of Selma.

"In this case the defendant does not appear or make answer. It is therefore considered by the Court that the said information be taken *pro confesso*, and that all the rights, privileges, and franchises of said association from the act of Congress in said information mentioned, are forfeited, and that the said association is adjudged by the Court dissolved." (See transcript of Record, pages 6 to 9, inclusive.)

The order for the rule *nisi* against the bank was made, but the rule was never issued, and there is in the record nothing to show that the bank had any notice of the information in the District Court against it.

The First National Bank of Selma was not in court, and the court had no jurisdiction over it, and *no power* to render a decree of dissolution against it.

The United States District Court is a court of limited jurisdiction, and its record must show affirmatively the validity of its sentences; but if this were otherwise the most violent presumption in favor of the validity of the proceedings, even of courts of general jurisdiction, never went so

far as to dispense with evidence of notice, actual or constructive, to the party against whom a decree or judgment was rendered.

Any judgment of any court which shows upon its face a want of jurisdiction of the subject-matter, or of the parties, is not merely voidable, but void. (Lamar vs. Com'rs of Marshall Co., 21st Ala. Rep., 772, 777.)

The appointment of a receiver (if it had been valid, which it is insisted is not the case,) would neither operate a dissolution of the corporation, or prevent its being sued by a creditor. (Bank of Bethel vs. Pahquiogue Bank, 14 Wall., 383, sup.)

The evidence of the appointment of a receiver is the proposed appointment by Hiland R. Hubbard, Comptroller of Currency, which is set forth upon page 5 of the printed transcript.

This is the only mode of proof of the fact of the appointment of a receiver, under this act of Congress, of which the subject is susceptible, and upon its sufficiency depends not only the evidence of the fact, but the fact itself. The facts which give the power to make the appointment, and the evidence of them, and the conclusion of the Commissioner upon those facts, must all appear upon the order appointing the receiver, or the order of appointment is void. When attentively considered, it will be readily admitted that it is seldom that such vast and incisive power as this is conferred by law upon one person, and that person a subordinate official in the Government. When the magnitude and extent of the interest to be affected, the arbitrary and rude invasion of individual right, the summary and absolute method of procedure, and conclusiveness of the action of the Comptroller are remembered, the mind cannot fail to be impressed with the importance of a careful and full compliance on the part of the Comptroller with every prerequisite to the exercise of this hazardous power which has been prescribed in the act conferring the power.

He is the sole judge of the existence of the facts upon which his power to act depends; but he must find the facts and must furnish the evidence of those facts upon the face of the order of appointment. The order of appointment is the only record of his exercise of the power, and it must bear the impress of its own validity—must show affirmatively the power of the Comptroller to make the appointment.

Every fact, without diminution as to number or substance necessary to the existence of the power, must appear, or there is *no* jurisdiction and the appointment is void.

The power to appoint receivers is conferred by section 50 of the act of Congress, or section 5234 of the Revised Statutes of the United States. See page 1018, as follows:

"Section 5234. On becoming satisfied, as specified in section 5226 and 5227, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver," &c.

The Comptroller must be satisfied of two facts: One is that an association has *refused* to pay its circulating notes, *as* mentioned in the two preceding sections above-named, and that it is in default. These are the facts he must *become* satisfied of, and he must become satisfied of them *in the manner specified* in sections 5226 and 5227.

The facts of which the Comptroller was satisfied, and upon which he based his appointment of a receiver in this case are, "that the said association has *failed* to redeem in lawful money, &c., and is in default." (See page 5 of transcript.) The act of Congress requires that he must become satisfied that the association has *refused*. Failure and refusal are different words and of different import. One is a negative, the other a positive act. Refusal would imply failure, but failure does not imply refusal. Failure may be the result of inattention, negligence, or accident. Refusal

involves deliberation and design. This is no compliance with the act of Congress. If by construction a departure from the language of the act is allowed, if more, a departure from the sense is recognized, what then is the line of departure, and what the rule of action for the Comptroller, or of protection to the millions, including both Government and people, who are interested in these national banking associations?

The act of Congress is not limited to prescribing the facts —of which the Comptroller is to become satisfied—but also declares the mode and the means by which he is to become satisfied, and these constitute jurisdictional facts which cannot be dispensed with, and which must affirmatively appear in the exercise of the power "on becoming satisfied, *as specified*, in sections 5226 and 5227." What is specified in these sections relating to the ascertainment of the facts of which the Comptroller is to be satisfied?

By section 5226 it is provided that whenever any national banking association fails to redeem its notes, &c., upon demand of payment duly made during *the usual hours of business at*, &c., the holder may cause the same to be protested in one package by a notary public, unless the president or cashier of the association whose notes are presented for payment, &c., offers to waive demand and notice of protest, and in pursuance of such offer makes, signs, and delivers to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of the non-payment *thereof*. The notary public on making such protest, or receiving such admission, shall forthwith forward such admission or notice of protest to the Comptroller of the Currency, retaining a copy thereof.

The notary public is the officer authorized by the act of Congress to receive the admission and send it or the notice of protest, as the case may be, to the Comptroller, and he is the only person authorized to do so. Done by him it is an

official act, authoritative, which the Comptroller is bound to regard and to act upon. If done by any other person it would have no authoritative import, and might be regarded or disregarded by the Comptroller, as he choose. "On receiving notice that any national banking association has failed to redeem any of its circulating notes, *as specified* in the *preceding section*, the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in lawful money of the United States when demanded, and shall report to the Comptroller the fact so ascertained." (Section 5227, Revised Statutes of the United States.)

The duty of the Comptroller as pointed out in this section is so specific and clear, and the reasons for each successive step are so obvious and forcible, as to need no comment to impress their importance upon the mind. Each step in the programme of action prescribed ~~for the Comptroller of the Currency~~ is based upon that which precedes and forms the basis of that which follows it, and all together lead to a prompt, circumspect, and assured ascertainment of the fact upon which is based the power to appoint a receiver, who, under the law, is authorized and required to take from the banking association *all its property*, and, in most cases, of the exercise of the power resulting in closing its existence. An officer clothed with such power should have unmistakable evidence of his authority, and the only evidence of which the case admits is the recitals of the order of appointment.

An inspection of the order of the Comptroller appointing the receiver in this case shows that scarce one of the requirements of the act of Congress in this particular has been complied with. Hopley, as examiner of national banks and special agent of the Comptroller of the Currency, had no more right to present a circulating note of the banking association at its

counter and demand payment than any other person. He had no official power to receive the admission of the cashier in writing or to forward it to the Comptroller. This should have been done by a notary public.

The special agent in such case could not have been appointed until after legal notice to the Comptroller, forwarded to him by a notary public, and then could only be appointed by him with the concurrence of the Secretary of the Treasury. Of such *appointment* immediate notice must be given to the banking association.

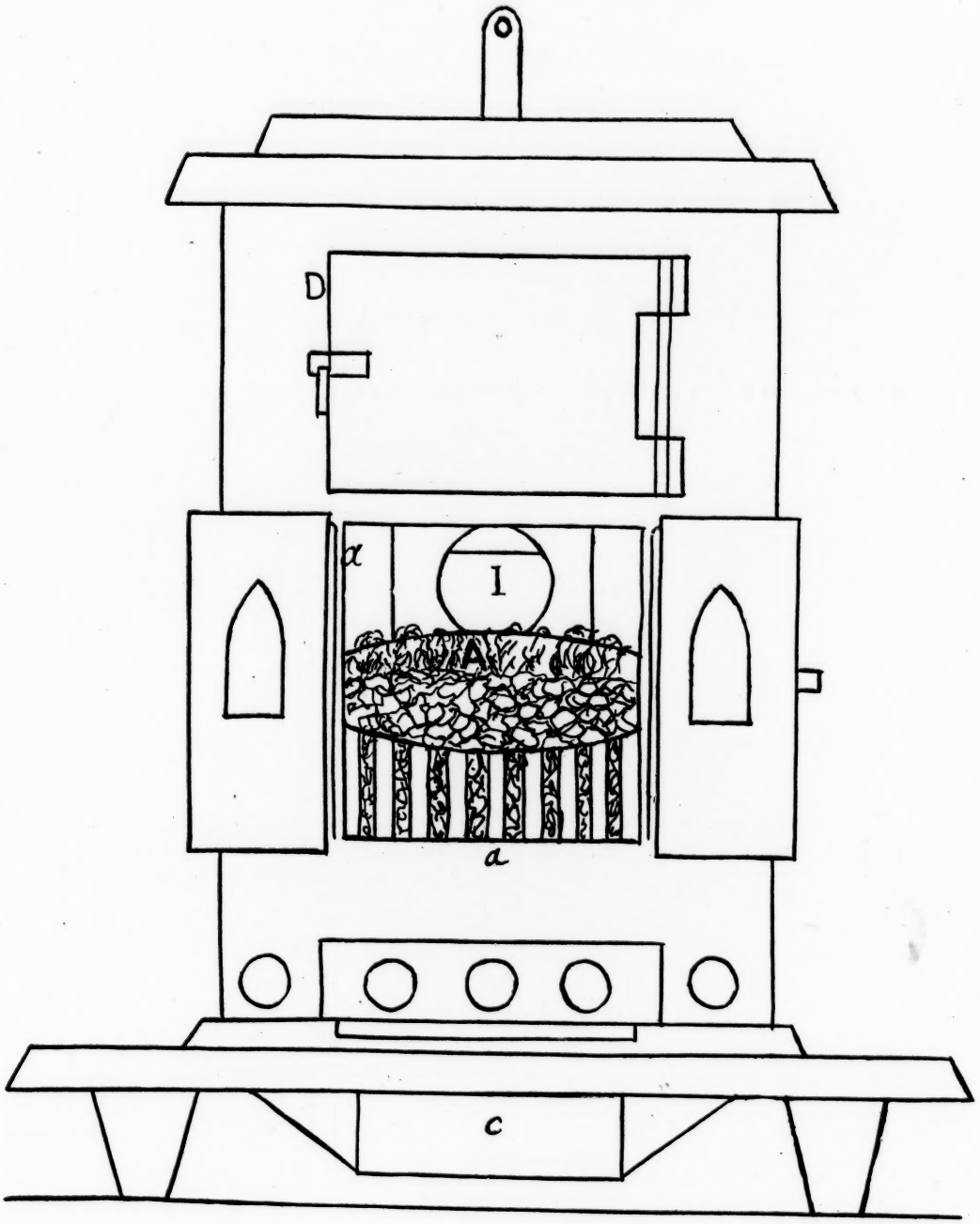
The special agent thus appointed is authorized and required to proceed immediately to ascertain whether the banking association *has refused* to pay its circulating notes, &c., and to report to the Comptroller the fact *so* ascertained.

Upon the report of the special agent thus appointed, and the fact *so* ascertained, the Comptroller has the power to appoint a receiver.

In the absence of any one of the constituent facts which as a whole, and only as a whole, constitute the predicate upon which the power to appoint a receiver rests, there can be no power to appoint, and the evidence of the existence of these facts must be furnished by the officer whose duty it is made by law to ascertain and act upon them, and whose certificate is the evidence of their existence — the Comptroller of the Currency. They are jurisdictional facts, necessary to the existence of the power to appoint, and if their existence does not appear, the want of them or of any one of them is fatal to the validity of the power. The rule of intendment against the jurisdiction of courts of limited jurisdiction applies with increased stringency to individual officers clothed by statute with summary and extraordinary powers. The presumption, in full consonance with reason and common experience, as well as with justice, is against the power, and all the facts necessary to the existence of the power must affirmatively appear.

Alex' M White
for
Dept in Error

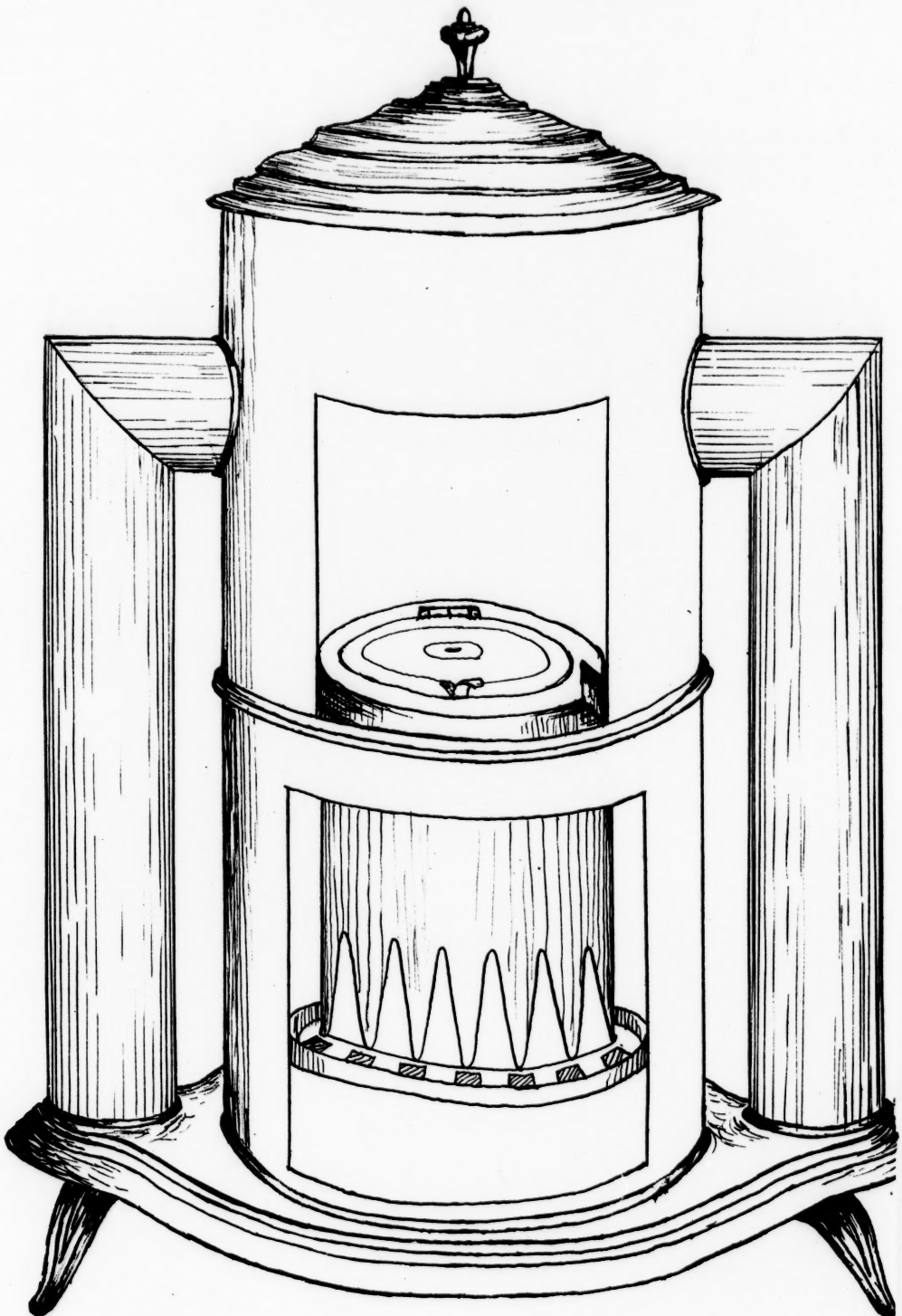
FIG 1.
STOVE OF 1849



Patented April 15, 1851.

No stoves were made strictly in accordance with this construction or ever expected to be

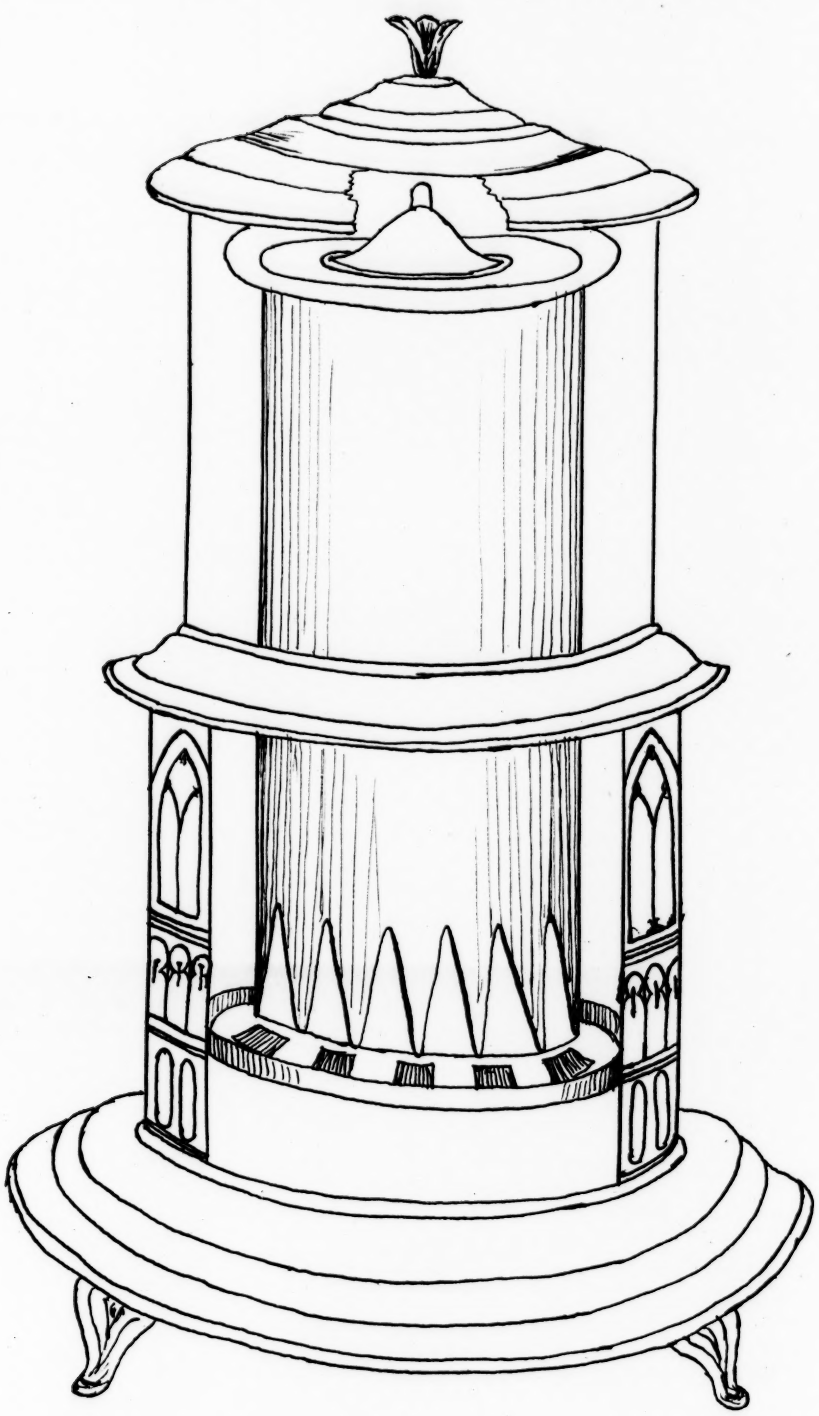
STOVE OF 1852.



Patent applied for in 1852 but application withdrawn in favour of Patent of January 24. 1854.

No stoves were made strictly in accordance with this construction or ever expected to be

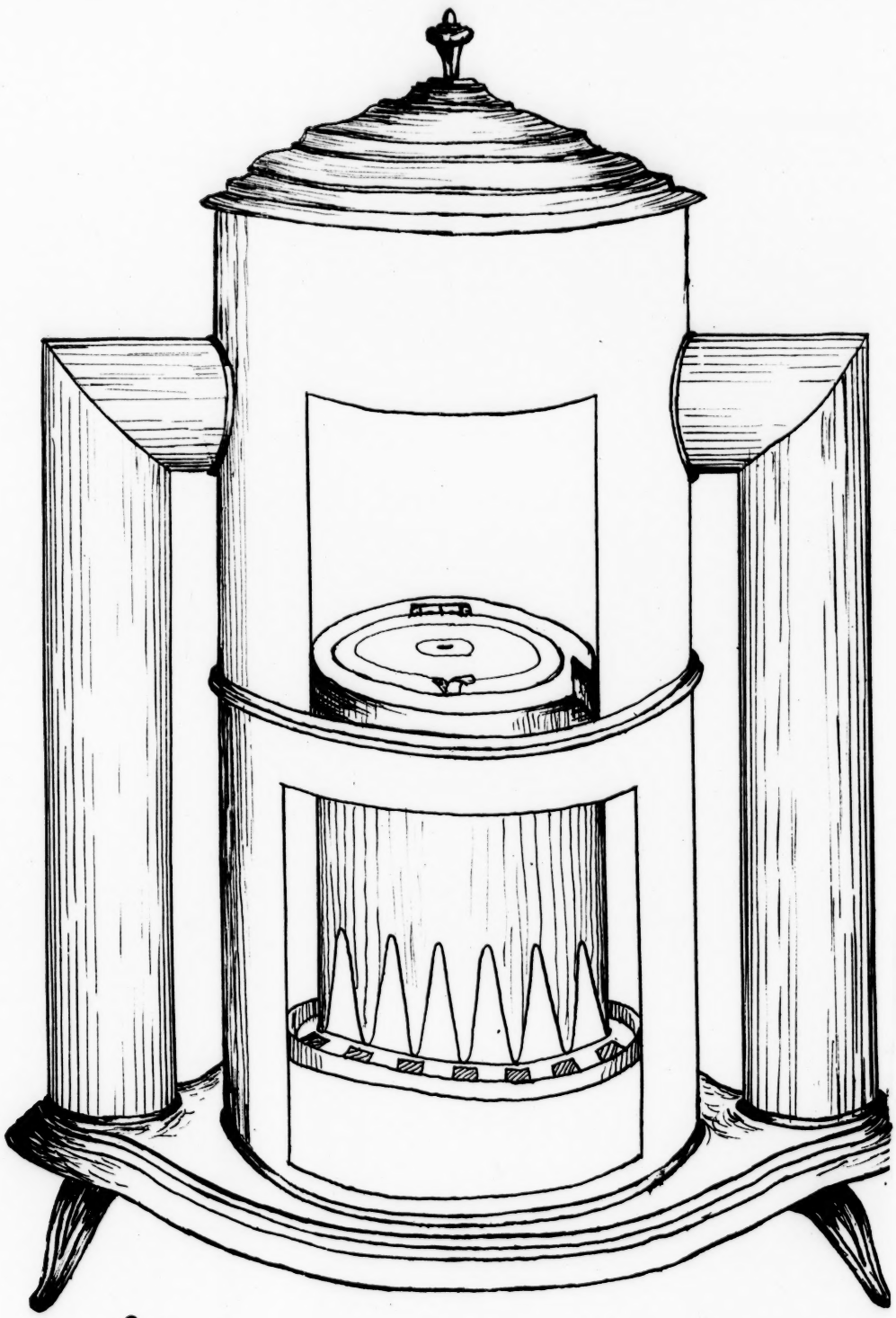
LOWELL GAS BURNER



Patented January 24. 1854.

Manufactured by Dreaucee & Perry
in 1853

STOVE OF 1852.



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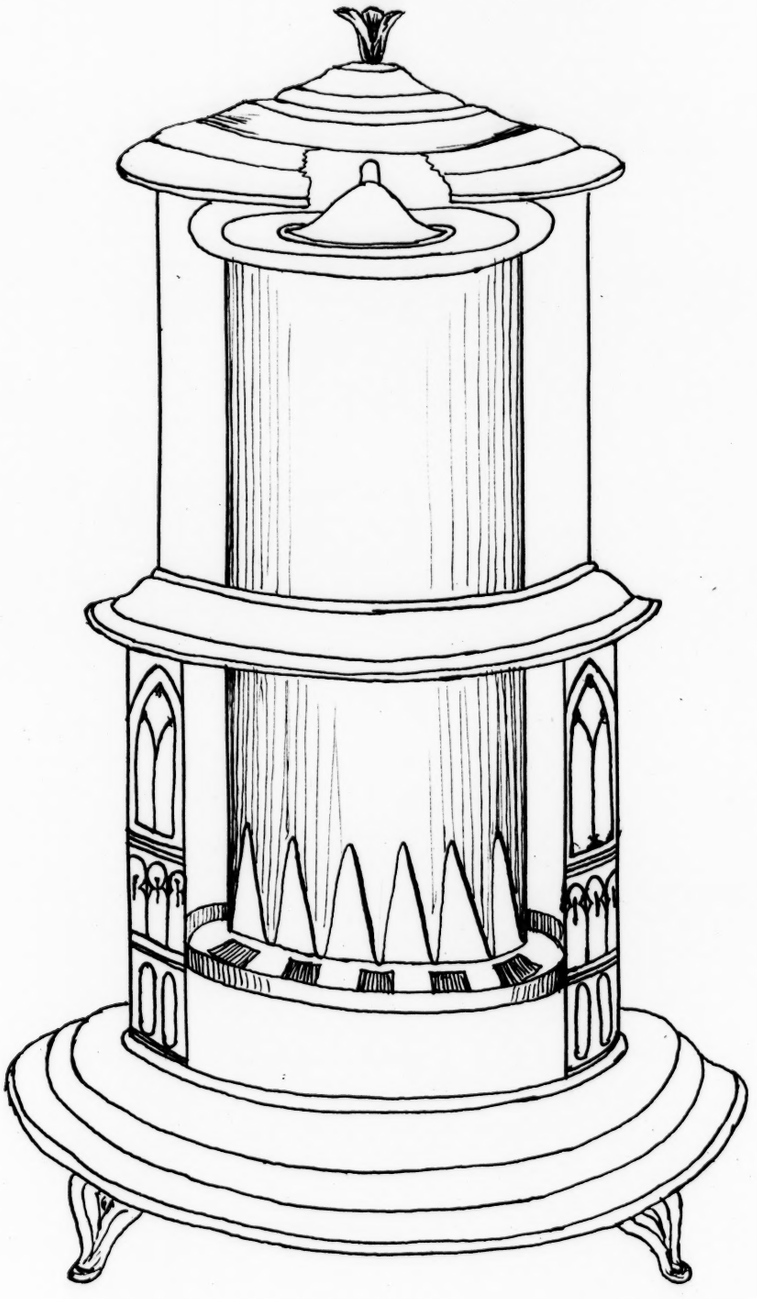
No stoves were made strictly in accordance with this construction or ever expected to be

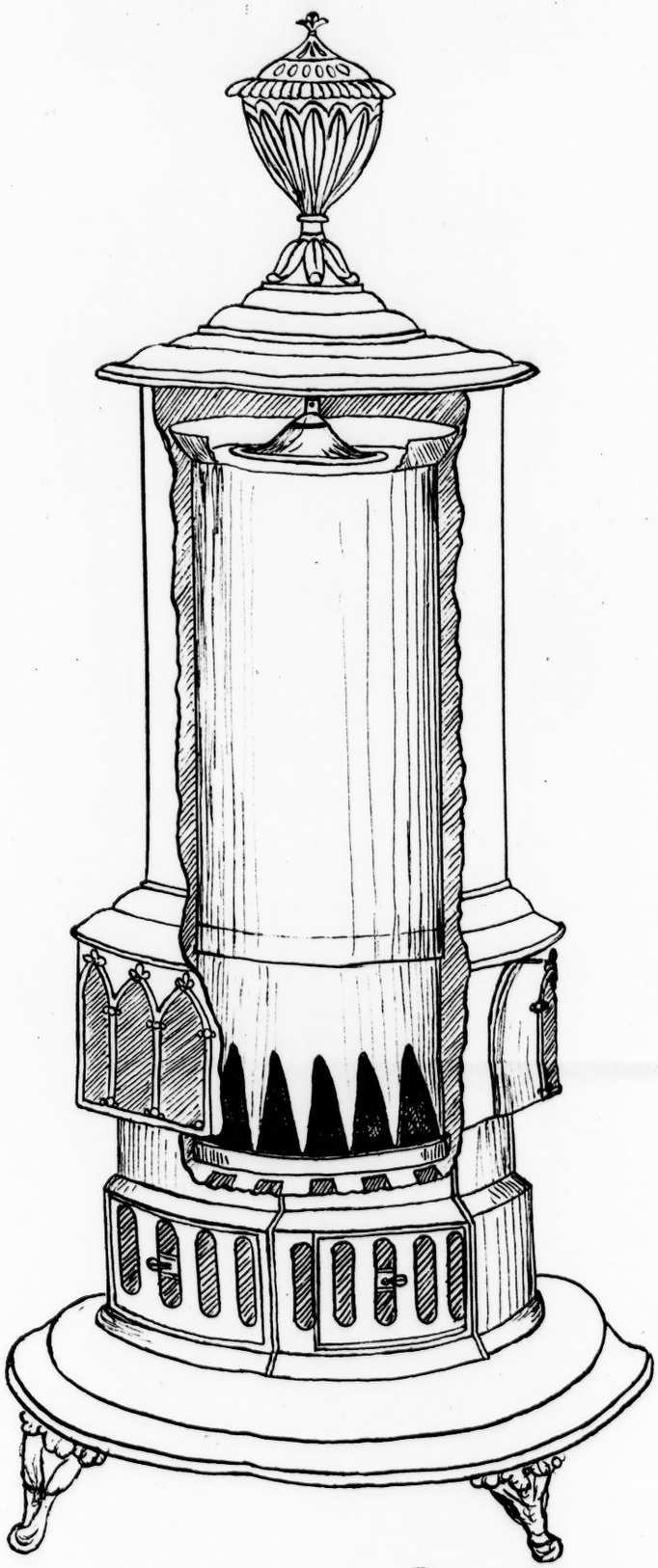
LOWELL GAS BURNER



Patented January 24. 1854.

Manufactured by Dreamcee & Perry
in 1853

LITTLEFIELD COAL BURNER



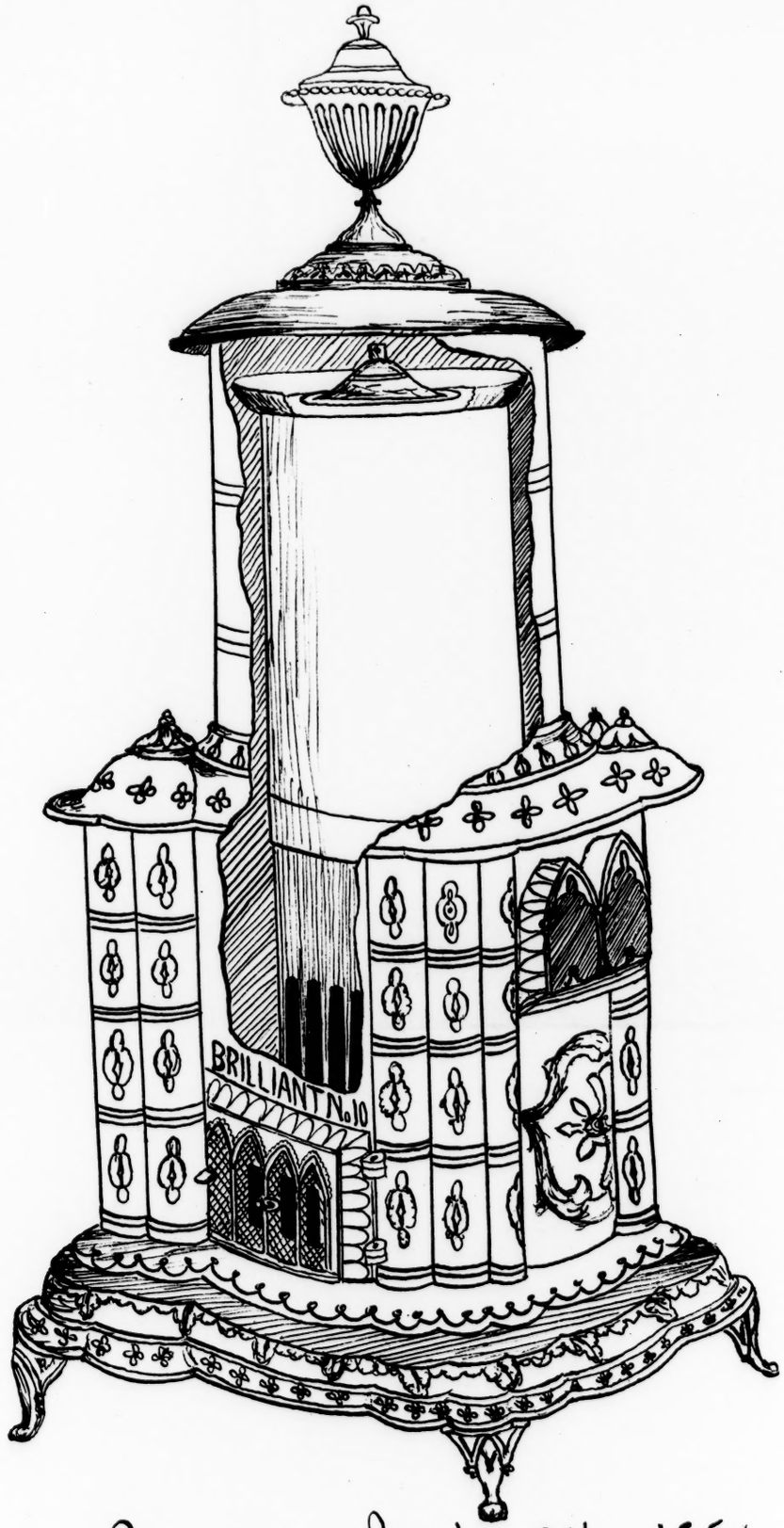
Sometimes called PERPETUM.

Patented January 24. 1854

Manufactured by Treadwell Penny and their Successors from 1854 to 1864

(5)

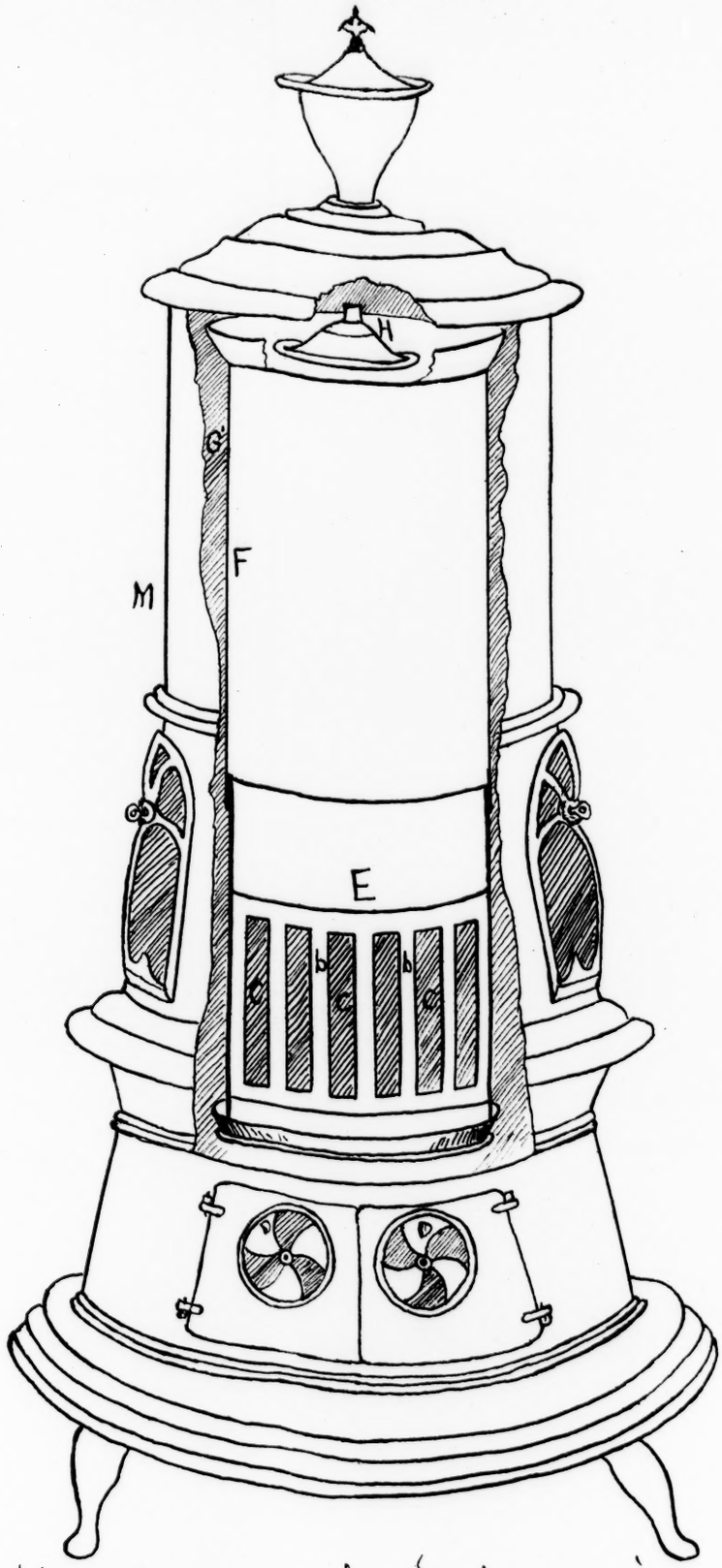
THE BRILLIANT.



Patented Janry 24. 1854.

Manufactured by Dreadnell Perry in 1854

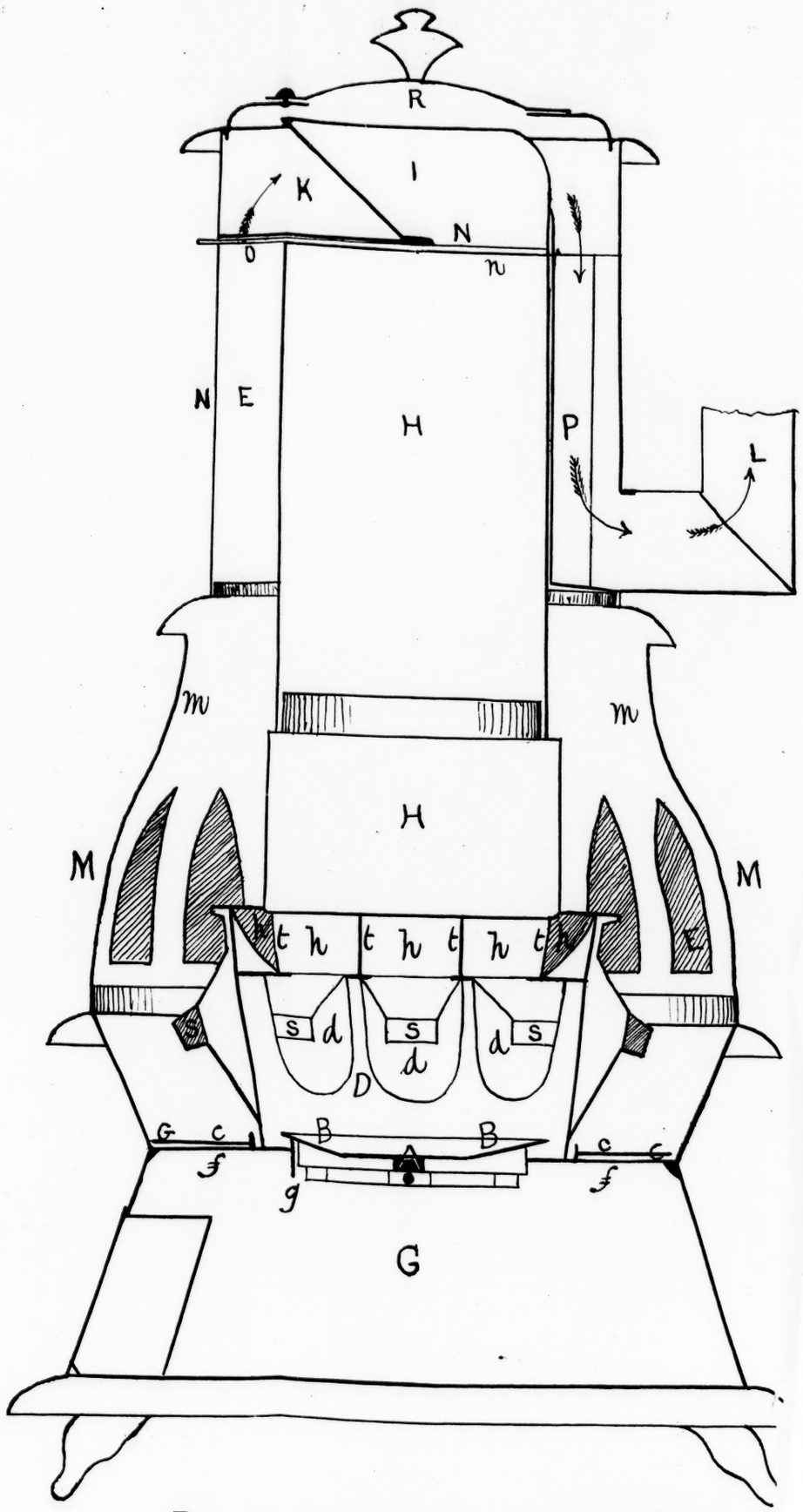
MORNING GLORY No. 1



Manufactured by Defents in
1862 and subsequently.

Patented,
January 24 1854
June 25. 1861.

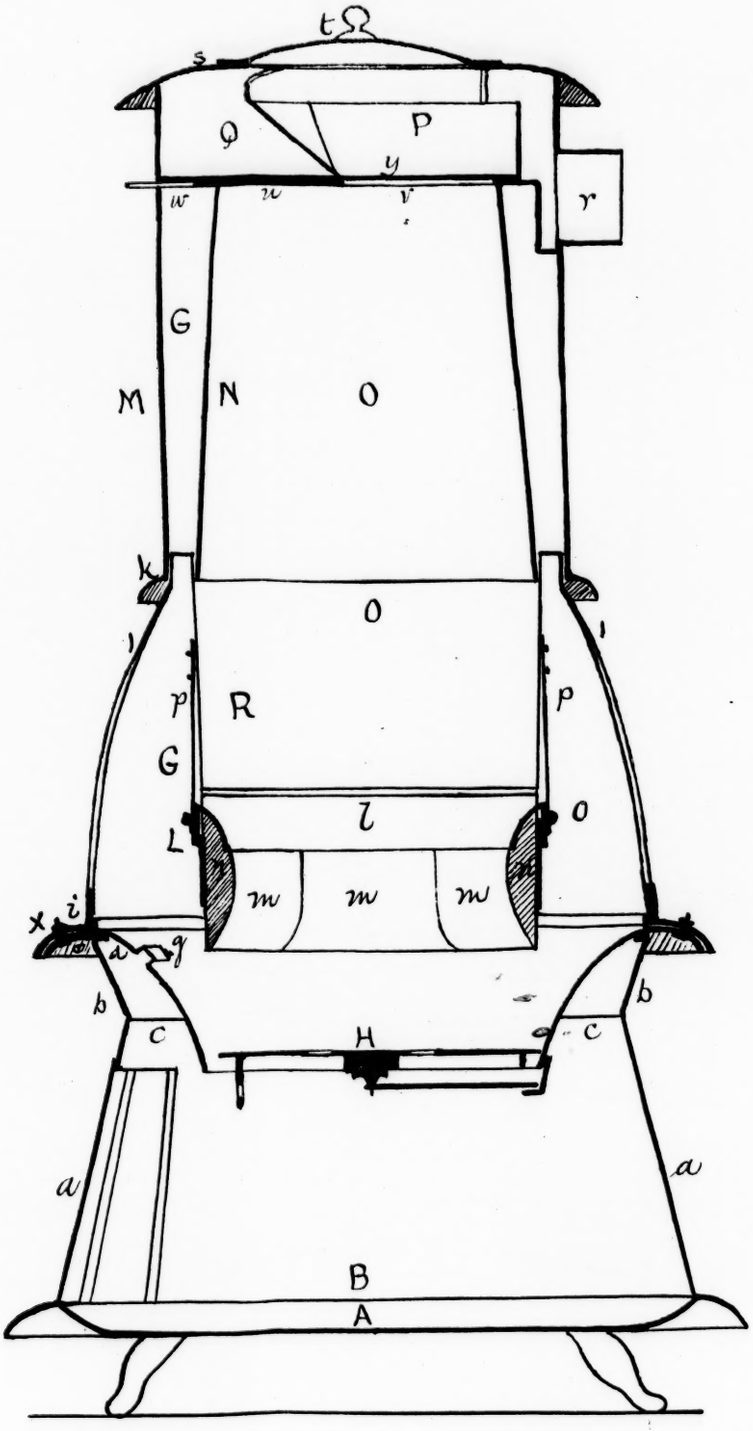
MORNING GLORY No. 2.



PATENTED NOV 26, 1862.

Manufactured by Defendants in 1862 and subsequ

MORNING GLORY No. 3.



Patented August 18, 1863.

Manufactured by Defendants in 1863 and subsequently

Exhibit "A" to be attached to the Deposition of

CHAS. T. SPENCER in "Home Ins. Co. vs. Stmbt. Mollie Mohler."

76½

Fr. Bloodgood

us Comr

N

W E

S

STLOUGH

Brewery

Cave

BLUFFS

RAIL ROAD GRADE

BOTTOM

SLOUGH

Ferry

Bar

Ferry House

CHANNEL

CHANNEL

High Bar

Minn. Val. R.R.

PICKEREL LAKE

BLUFFS

Outlet

Transfer House

Steamboat Mollie Mohler &c.
vs.
Home Insurance Co.
No 3348 Page 76

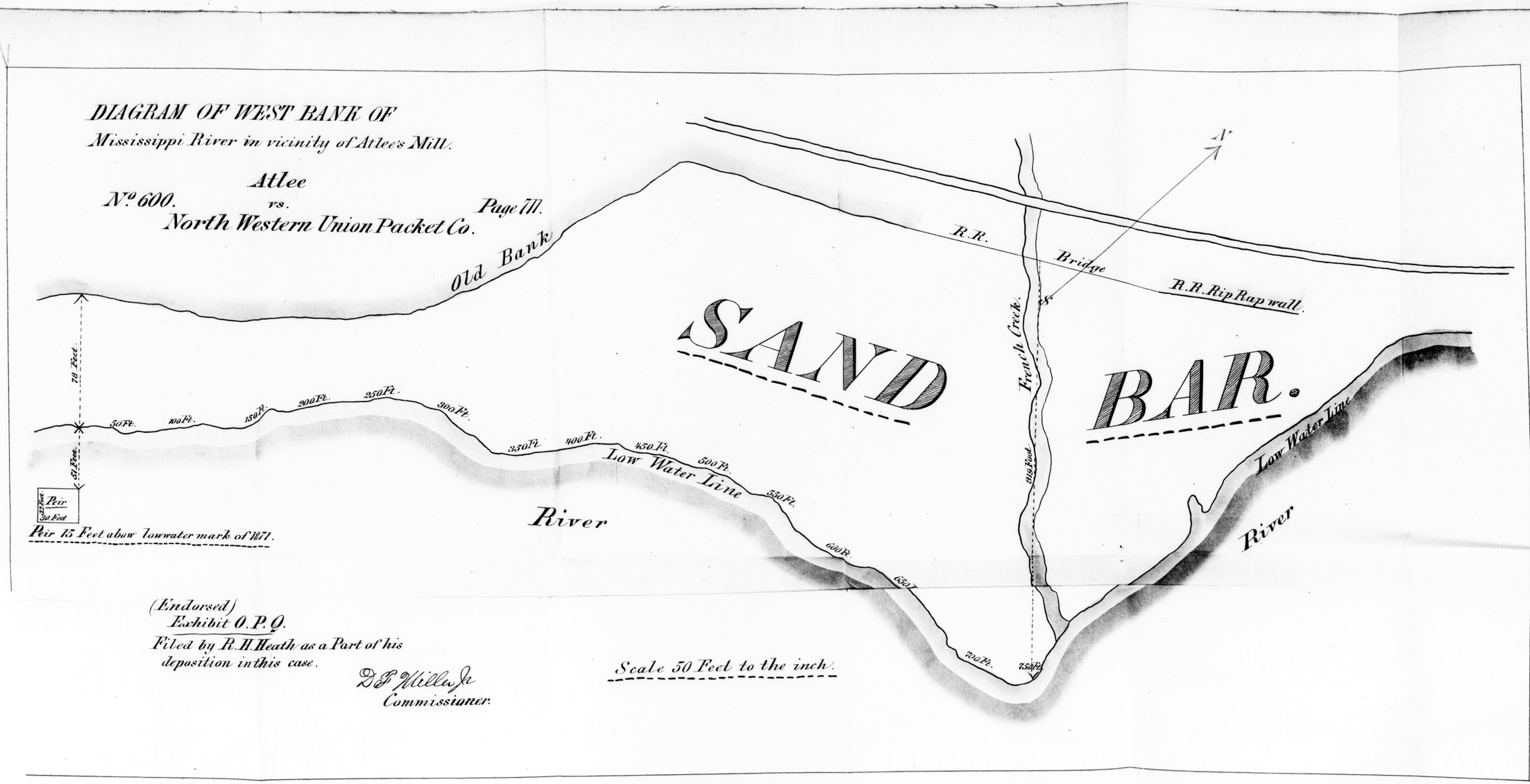


DIAGRAM OF WEST BANK OF
Mississippi River in vicinity of Atlee's Mill.
Atlee
No 600. vs.
North Western Union Packet Co.
Page 111.
Old Bank
R.R.
Bridge
R.R. Rip Rap wall
SAND
BAR.
French Creek.
78 Feet.
50 Ft.
100 Ft.
150 Ft.
200 Ft.
250 Ft.
300 Ft.
350 Ft.
400 Ft.
450 Ft.
500 Ft.
550 Ft.
600 Ft.
650 Ft.
700 Ft.
750 Ft.
310 Feet.
Low Water Line
River
Low Water Line
River
37 Feet
Pier
30 Feet
Pier 15 Feet above lowwater mark of 1871.
(Endorsed)
Exhibit O.P.Q.
Filed by R.H.Heath as a Part of his
deposition in this case.
D.F. Willes Jr
Commissioner.
Scale 50 Feet to the inch.

Exhibit A filed with deposition of

E. H. Nowell *M. Atlee*
Comm

Atlee —
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North Western Union Packet Co.

No. 600.
Page 860.

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Mississippi River

Island

East Shore of River

Delta of French Creek

Edge of Bar

Pier 29 Feet

Shore at Side of Pier

Channel

Shore at River at time of Survey.

Pier

C. & P. R. R.

Rail Road Bridge

Atlee's Mills.

Pier 650 from Delta of Creek

MAP
showing location
of
Atlee's Boom Piers.

Scale 100 feet to 1 Inch.

Survey made when river was 2 Ft above low water mark as Shown by Mr Atlee at the time.